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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]46

SPRINGFIELD GAS & ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF SPRINGFIELD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MAY 8, 1920.

(27,666)

(27,666)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 327.

SPRINGFIELD GAS & ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF SPRINGFIELD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the Third Day of December, in the Year of Our Lord One Thousand Nine Hundred and Eighteen, within and for the State of Illinois.

Present:
Warren W. Duncan, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice William M. Farmer.
Justice Frank K. Dunn.
Justice Clyde E. Stone.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL,
Clerk.

Be it remembered, that to-wit, on the 9th day of November, A. D. 1918, the same being one of the days in vacation before the term of Court aforesaid a record of the proceedings had in the Circuit Court of Sangamon County was filed by Springfield Gas & Electric Company, appellant, in the office of the Clerk of the Supreme Court of Illinois in words and figures following, to-wit:

2 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. Frank W. Burton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (The same being the first day) of November in the year of our Lord One Thousand Nine Hundred and Fifteen.

Present:
Hon. Frank W. Burton, Judge.
Edmund Burke, State's Attorney.
J. A. Wheeler, Sheriff.
J. H. Drennan, Clerk.

3 And afterwards to-wit on the 18th day of December A. D. 1915, there was issued out of the office of the Clerk of the

Sangamon County Circuit Court, a certain summons in chancery; a copy of said summons, together with the endorsements of the Sheriff thereon being in the words and figures as follows to-wit:

4 STATE OF ILLINOIS,
Sangamon County, ss:

The People of the State of Illinois to the Sheriff of Sangamon County, Greeting:

We command you to summon City of Springfield, a municipality of the State of Illinois, Willis J. Spaulding, Commissioner of Public Property, J. Emil Smith, Commissioner of Accounts and Finances if to be found in your County, to appear before the Circuit Court of Sangamon County, on the first day of the next term thereof, to be holden at the Court House, in the City of Springfield, on the first Monday in the month of January, A. D. 1916, to answer unto a bill in Chancery filed in the office of the Clerk of the Circuit Court of Sangamon County against it and them by Springfield Gas and Electric Company, Complainant, and hereof make due return to said Court as the law directs.

Witness, J. H. Drennan, Clerk of said Court and the Judicial Seal thereof, at Springfield, this eighteenth day of December, A. D. 1915.

[Official Seal.] J. H. DRENNAN,
Clerk.

[Endorsed:] Sangamon County Circuit Court. Springfield Gas & Electric Company vs. City of Springfield, et al. To January Term, A. D. 1916. Summons in Chancery. Filed Dec. 22, 1915. J. H. Drennan, Clerk. Sheriff's Fees. Service of Summons, $1.95; Returning Summons .10; Making Copy, .30; — Miles Travel, .30; Total Amount, 2.65. Sheriff of Sangamon County, Illinois. Patton & Patton, and Wilson, Warren & Child, Complainant's Solicitor.

"Return of Sheriff on Back of Summons."

STATE OF ILLINOIS,
Sangamon County, ss:

I have served the within writ upon the City of Springfield, a municipality of the State of Illinois, by reading the within to and also by leaving a true copy thereof with O. F. Davenport, City Clerk of the City of Springfield, a municipality of the State of Illinois, this 18th day of December A. D. 1915.

I have served the within writ by reading the within to and also by leaving a true copy thereof with each of the within named Willis J. Spaulding, Commissioner of Public Property and J. Emil Smith, Commissioner of Accounts and Finances, this 18th day of December A. D. 1915.

J. A. WHEELER,
Sheriff.

5 And afterwards to wit on the 31st day of December A. D. 1915, the same being one of the term days of the November Term A. D. 1915 of the Sangamon County Circuit Court, the following order was entered of record to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court Adjourn until Court in Course."

6 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. James A. Creighton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (The same being the third day) of January, in the year of our Lord One Thousand Nine Hundred and Sixteen.

Present:

Hon. James A. Creighton, Judge.
Edmund Burke, State's Attorney.
J. A. Wheeler, Sheriff.
J. H. Drennan, Clerk.

7 And afterwards to wit on the 4th day of March A. D. 1916, the same being one of the term days of the January Term A. D. 1916 of the Sangamon County Circuit Court, the following order was entered of record to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court Adjourn until Court in Course."

8 And afterwards to wit on the 28th day of April A. D. 1916, the same being one of the term days of the March Term A. D. 1916 of the Sangamon County Circuit Court, the following order was entered of record to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court Adjourn until Court in Course."

9 And afterwards to wit on the 29th day of July A. D. 1916 the same being one of the term days of the May Term A. D. 1916 of the Sangamon County Circuit Court, the following order was entered of record to wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court Adjourn until Court in Course."

10 And afterwards to-wit on the 4th day of November A. D. 1916, the same being one of the term days of the September Term A. D. 1916 of the Sangamon County Circuit Court, the following Order was entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

11 And afterwards to-wit on the 30th day of December A. D. 1916, the same being one of the term days of the November Term A. D. 1916 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

12 And afterwards to-wit on the 22d day of February A. D. 1917, the same being one of the term days of the January Term A. D. 1917 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

13 And afterwards to-wit on the 5th day of May A. D. 1917, the same being one of the term days of the March Term A. D. 1917 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

14 And afterwards to-wit on the 29th day of August A. D. 1917, the same being one of the term days of the May Term A. D. 1917 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

15 And afterwards to-wit on the 30th day of October A. D. 1917, the same being one of the term days of the September Term A. D. 1917 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

16 And afterwards to-wit on the 5th day of January A. D. 1918, the same being one of the term days of the November Term A. D. 1917 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

17 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the seventh day) of January, in the year of our Lord One Thousand Nine Hundred and Eighteen.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
J. A. Wheeler, Sheriff.
Chas. L. Koehn, Clerk.

18 And afterwards to-wit on the 7th day of February A. D. 1918, the same being one of the term days of the January Term A. D. 1918 of the Sangamon County Circuit Court, the following among other proceedings were had and entered of record to-wit:

SPRINGFIELD GAS & ELECTRIC COMPANY, Complainant,

vs.

CITY OF SPRINGFIELD et al., Defendants.

Injunction.

On motion of the complainant by its solicitor, leave is hereby given it to file an Amended Bill, and the same is now filed.

19 And afterwards to-wit on the 7th day of February, A. D. 1918, there was filed in the office of the Clerk of the Sangamon County Circuit Court, a certain Amended Bill of Complaint; a copy of said Amended Bill being in the words and figures as follows to-wit:

In the Circuit Court of Sangamon County, State of Illinois, January Term, 1918.

In Chancery.

SPRINGFIELD GAS AND ELECTRIC COMPANY, Complainant,

vs.

THE CITY OF SPRINGFIELD, a Municipality of the State of Illinois, Defendant.

Amended Bill of Complaint.

To the Honorable Judges of the Circuit Court of the County of Sangamon and the State of Illinois, in chancery sitting:

Now comes Springfield Gas and Electric Company, Complainant herein, and leave of Court being first had and obtained, files this, its Amended Bill of Complaint in lieu of and in substitution for the Original and supplemental Bills of Complaint, heretofore filed herein, as follows:

20 Your orator, the Springfield Gas and Electric Company, brings this, its Amended Bill of Complaint, against the City of Springfield, a municipal corporation of the State of Illinois, dismissing from the cause, Willis J. Spaulding and J. Emil Smith, defendants, to said original Bill of Complaint; and thereupon your Orator complains and says:

I.

That your Orator is a corporation organized and existing under and by virtue of the Laws of the State of Illinois, and having power under its Charter (among other things) to own and operate in the City of Springfield, a plant for the production, distribution and sale of electricity for light, heat and power.

II.

That by virtue of such powers, and by virtue of Licenses and ordinance contracts (commonly called franchises) granted by said City of Springfield and entered into by and between your Orator and said City of Springfield prior to the 30th day of June, 1913, your Orator acquired, constructed and equipped, within the territorial limits of said City of Springfield, a certain plant for the production, distribution and sale of electricity for light, heat and power, and ever since, your Orator has owned and operated, and now owns and is operating said plant and producing, distributing and selling electricity therefrom within the territorial limits of said City of Springfield and in the adjacent portions of said County of Sangamon, State of Illinois; and your Orator has, in all things, complied with the provisions of the Act of the General Assembly

of the State of Illinois, entitled "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, and in
21 particular, has fully complied with Sections 33 and 34 of the said Act, in so far as the same are applicable to the business of your Orator.

III.

Your Orator further shows that said City of Springfield, now made defendant herein, is a municipal corporation, organized and existing under and Act of the General Assembly of the State of Illinois, entitled: "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, and the amendments thereto; and said City of Springfield has heretofore adopted the provisions of an Act of the General Assembly of the State of Illinois, entitled: "An Act to amend an Act, entitled: 'An Act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, and all Acts amendatory thereto by adding thereto Article XIII," approved March 9, 1910; and that said City of Springfield is now operating thereunder.

IV.

That an Act of the General Assembly of the State of Illinois, entitled: "An Act to provide for the regulation of Public Utilities," (hereinafter for brevity referred to as "Public Utilities Act") passed June 30, 1913, became effective Jan 1, 1914.

V.

That subsequent to the 1st day of January, 1914, and thence hitherto, said City of Springfield has been and is now producing, generating, distributing and selling electricity for light, heat and power, for the use of and to private consumers or users for hire or charge within the territorial limits of said City of Springfield and adjacent portions of the County of Sangamon, all in the State of Illinois, and thereby is a public utility within the meaning
22 of said term as used in said Public Utilities Act.

VI.

That your Orator is informed and believes that said City of Springfield claims it is exempt in so operating said electric plant and so selling the product thereof, from the operation of the provisions of said Public Utilities Act, by reason of the pretended exceptions contained in Section 10 of said Public Utilities Act, purporting and attempting to exempt municipal corporations owning and operating Public Utilities from the operation of said Act; but your Orator charges that said pretended exceptions do not exempt, from the operation of said Act, municipal corporations owning and operating electric plants for the use or benefit of private consumers or users

for hire or charge, but only excepts therefrom municipal corporations owning and operating electric plants for, or that portion of such electric plants as is used for, purely municipal needs and purposes; and your Orator charges that said City of Springfield, in the ownership and operation of its said electric plants for the use or benefit of private consumers for hire or charge, is subject to and within the meaning, terms and provisions of said Public Utilities Act, and particularly subject to Sections 33, 34 and 35 thereof.

That if said pretended exceptions contained in Section 10 of said Act do have the effect of pretending or attempting to exempt municipal corporations owning and operating electric plants for the use or benefit of private consumers, or users for hire or charge, from the operation of said Public Utilities Act, such exceptions are wholly invalid and void and in violation of Section 22 of Article
23 IV of the Constitution of the State of Illinois and also in violation of the Fourteenth Amendment to the Constitution of the United States.

VII.

That said City of Springfield has never filed with the Public Utilities Commission of Illinois, and printed and kept open to public inspection, schedules showing all rates and other charges, and classifications, which are in force at the time for any produce or commodity furnished or to be furnished by said City of Springfield, in the operation of its said electric plants, or for any service performed by said City of Springfield, or for any service in connection with the operation of its electric light plant in the production, generation, distribution and sale of electricity for light, heat and power purposes, as provided for in Section 33 of said Public Utilities Act.

VIII.

That said City of Springfield, in connection with the production, generation, distribution and sale, for and to private consumers, of electricity for light, heat and power purposes, has not published and posted schedules of rates as provided by Section 34 of said Public Utilities Act.

IX.

That said City of Springfield, in violation of Section 35 of said Public Utilities Act, is producing, generating, distributing and selling electricity for light, heat and power purposes, for the use and benefit of users or private consumers for hire or charge, without filing and publishing the rates and other charges and classifications, rules and regulations relating thereto, applicable to such service, product or commodity as provided by Sections 33 and 34 of said Public Utilities Act.

24

X.

That in the production, generation, distribution and sale of electricity for light, heat and power purposes, to users or private consumers for hire or charge, as aforesaid, the said City of Springfield, is engaged in and carrying on the same kind of a commercial enterprise as your Orator is in the production, generation, distribution and sale of electricity for light, heat and power purposes to users and private consumers for hire within the territorial limits of said City of Springfield, and the adjacent parts of said County of Sangamon; and therein and thereby is competing with your Orator for such commercial business.

XI.

That at the present time, and for some time last past, the said City of Springfield is and has been soliciting the patrons of your Orator to cease purchasing electricity from your Orator at the rates and charges filed and published by your Orator in compliance with the provisions of said Public Utilities Act, and to purchase electricity from said City of Springfield, at rates and charges not filed and/or published by said City in compliance with the provisions of said Public Utilities Act; that from time to time since the 1st day of January, 1917, many consumers using electricity generated and distributed by your Orator and paying your Orator the rates and charges therefor filed and published in compliance with said Public Utilities Act, have ceased to be patrons of your Orator and have become patrons of said City of Springfield, purchasing electricity generated, distributed and sold to them by said City as aforesaid, and paying rates and charges therefor which are not, and never have been, filed and published in compliance with the provisions of said Public Utilities Act, and therein and thereby causing your Orator great and irreparable loss; that unless said city is re-

25 strained as hereinafter prayed, it will continue to deprive your Orator of many other of its patrons, and to generate, distribute and sell electricity to private consumers at rates and charges not filed and published by it in compliance with the provisions of said Public Utilities Act, thereby causing your Orator further and greater irreparable loss, and in violation of the provisions of said Public Utilities Act; that said City is threatening to continue its said unlawful practices and your Orator is informed and believes it will do so, unless enjoined and prevented therefrom by this Honorable Court.

Prayer.

Forasmuch therefore, as your Orator is without remedy in the premises, without filing this, its Amended Bill of Complaint, and can only obtain relief in a Court of equity, where matters of this kind are cognizable, and to the end that the said City of Springfield, a municipality of the State of Illinois, hereby made party defendant to

his Amended Bill of Complaint, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived; and that the said City of Springfield and all persons acting for and in its behalf, be enjoined and restrained by the injunction of this Court from operating in whole or in part, any electric plant owned or used by said City for the production, generation and distribution of electricity to private consumers for hire or charge, without having first filed schedules of rates of charges to private consumers, and printed and posted the same as prescribed by Sections 33 and 34 of An Act of the General Assembly of the State of Illinois, entitled: "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, effective January 1, 1914.

26 And that your Orator may have such further and other relief in the premises as the nature of its case shall require.

SPRINGFIELD GAS AND ELECTRIC COMPANY,
By A. D. MACKIE,
Its Vice President and General Manager.
PATTON & PATTON,
WILSON, WARREN & CHILD,
Solicitors for Complainant.

STATE OF ILLINOIS,
County of Sangamon, ss:

A. D. Mackie, being first duly sworn on oath, says: That he is the Vice President and General Manager of the Springfield Gas and Electric Company, Complainant, in the foregoing Amended Bill of Complaint: That he has read said Amended Bill of Complaint and knows the contents thereof; that all the matters and things therein set out are true; and that he is authorized to make this Affidavit for and in behalf of Complainant.

A. D. MACKIE.

Subscribed and sworn to before me this 6th day of February, 1918.
L. M. IRVING,
[Notarial Seal.] *Notary Public.*

27 And afterwards to-wit on the 28th day of February A. D. 1918, the same being one of the term days of the January Term A. D. 1918 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

28 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. Frank W. Burton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the fourth day) of March, in the year of our Lord One Thousand Nine Hundred and Eighteen.

Present:

Hon. Frank W. Burton, Judge.
C. F. Mortimer, State's Attorney.
J. A. Wheeler, Sheriff.
Chas. L. Koehn, Clerk.

29 And afterwards to-wit, on the 18th day of March A. D. 1918, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Answer to Amended Bill; a copy of said Answer being in the words and figures as follows to-wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, March Term, A. D. 1918.

In Chancery.

SPRINGFIELD GAS AND ELECTRIC COMPANY

vs.

THE CITY OF SPRINGFIELD.

Answer.

Answer of the City of Springfield to the Amended Bill of Complaint of the Springfield Gas and Electric Company, Complainant in the Above-entitled Cause.

This defendant, The City of Springfield, at all times hereinafter saving and reserving unto itself all benefit and advantages of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill contained, for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering says:

I.

It is not advised as to whether said complainant is a corporation, nd as such organized and existing under the laws of the State of llinois, with charter power to own and operate in said City a plant or the production, distribution and furnishing of electricity for ght, heat and power, and with charter power to vend and sell the me under the laws of this State, and therefore as to said allegations, nd each and all of them, it neither affirms nor denies the same, but ks that strict proof be made thereof.

II.

Further answering, it says that no license contract or franchise of ny kind has ever been granted by said City to said complainant, nd that as to the transfer, or the legality thereof if any, to said com- lainant of any license contract granted by said City to a grantee or rantees other than said complainant it is not advised, and therefore either affirms nor denies, but demands strict proof of the legality of uch license contract and the transfer thereof to the complainant; hat there is in said City a certain plant constructed and equipped or the production and distribution and furnishing of electricity for ght, heat and power, and that said plant is now being operated and producing, distributing and furnishing for hire electricity within aid City and the adjacent portions of Sangamon County, and that is the general report that said plant is owned and so operated by n association or corporation styling itself the Springfield Gas and lectric Company, but that as to the existence of such association or orporation as a corporation or as its ownership, or control of such lant, or as to the compliance by said corporation, if a corporation, ith the provisions of an Act of the General Assembly of the State of Illinois, entitled "An Act to provide for the regulation of 1 Public Utilities," approved June 30, 1913, this defendant is not advised, and therefore neither affirms nor denies said llegations, and each of them, but demands strict proof thereof.

III.

Further answering, they admit that the said City of Springfield is municipal corporation, organized and existing under an Act of the eneral Assembly of this State entitled "An Act to provide for the ncorporation of cities and villages," approved April 10, 1872, and mendments thereto, and that said City has heretofore adopted, and now operating under, the provisions of the "Commission Form of lunicipal Government Act" and the amendments thereto.

IV.

Further answering, it shows that the Act of the General Assembly f the State of Illinois, entitled "An Act to authorize cities to ac-

quire, construct, own and lease or operate public utilities and to provide the means therefor," was duly passed June 26, 1913, and became effective July 1, 1913.

V.

Further answering, it shows that the Act of the General Assembly of the State of Illinois, in Paragraph IV of the amended bill of complaint herein referred to, was duly passed June 30, 1913, and became effective January 1, 1914.

VI.

Further answering, it avers that on and for many years prior to July 1, 1913, said City owned and operated an electric light plant located at the corner of Tenth and Reynolds Streets in said City with boilers, engines, generators and equipment used for the purpose of producing electricity, and that said plant was then and for many years prior thereto used for the production of electric current.

32 It shows that the normal life of such machinery and equipment is about twenty years, and that the said machinery and equipment at said location had then been in continuous use for over nineteen years, and was an electric light plant owned and operated by the City for the City's own use on, long prior to, and since said July 1, 1913; that on said date said steam plant was old and worn and incapable of operation at above 60 per cent normal pressure, and was operated by order of the Boiler Inspector at about one half normal pressure; that the remainder of said machinery and equipment was also old and worn and incapable of operation with economy or without danger to the City's employees operating the same.

That so long as it was capable of operation at all, it produced current in excess of that required by said City for Street lighting and other municipal purposes; that such excess had been produced for a number of years and was being produced at the date last above mentioned, and subsequent thereto, and that said City, in order not to allow such excess to go to waste, did for many years prior to said date, and subsequent thereto, sell such excess to private consumers for hire; that a considerable portion of such excess current had for several years been sold to the Pleasure Driveway and Park District of Springfield, a corporation organized and existing under the laws of this State, within the territorial limits of which all of said City is located, and that other portions of such excess current were sold to private consumers as such consumers could be procured.

VII.

Further answering, it shows that on and prior to July 1, 1913, there was located at the pumping station of the water works of said City at the Sangamon River, A 125 KVA electric generator, connected with said city lighting plant by a large, well-con-

33 structed and adequate transmission line, and that the current supplied by said generator was mingled with the current sup-

plied from said electric plant, and used as hereinbefore described; that said generator at said pumping plant also supplied current with which to operate certain drive wells forming a part of said water works system, and that all current developed by said generator in excess of that so used for drive well purposes was mingled with the current of said lighting plant at Tenth and Reynolds Streets, and used as a part of said current in the manner hereinbefore described.

VIII.

Further answering, this defendant shows that during the year 1915 said City purchased and installed at said pumping plant a 750 KVA electric generator, and has from thence hitherto and now is operating the same. That prior to the operation in said City of the so-called "Commission Form of Municipal Government Act", there were approved by the then City Council of said City plans and specifications for a building to be located at its pumping station on the Sangamon River, which plans and specifications included in said building ample room and space for the housing of its municipal electric lighting plant; that it was the then intention of said City to replace the machinery at its electric lighting plant at Tenth and Reynolds Streets, as the same should become worn out and unfit for use, with new machinery located in said building at said water works pumping station; that since the adoption by the City of said so-called "Commission Form of Municipal Government Act", the City Council re-approved said plans for said building and that said building as so designed has been constructed and is now complete and contains ample room for the proper housing of all the generating machinery necessary for the present and reasonably to be expected future needs of said City and is located upon ground owned,
34 possessed and controlled by said City at said Water works pumping station near said Sangamon River.

That the City's municipal lighting plant can be and is operated at said pumping station by the use of turbo-generators at a savings of from 33 per cent to 50 per cent of the cost of operation at the location at Tenth and Reynolds Streets, and that the City can operate and is operating the same in combination with its water works plant with an additional savings in cost of operation of both light plant and pumping station, due to said combined operation.

That the said worn-out generating units of the City's electric light plant at Tenth and Reynolds Streets were replaced with more efficient turbo generating units located in said building at said pumping station at less original cost than would have been required to replace the same at the Tenth and Reynolds Streets location because of the fact that turbo generators cannot be economically used at the last mentioned location on account of lack of water for condensing purposes, but can be and are used at said pumping station location where water for condensing purposes can be supplied by gravity from the Sangamon River, and that because of the aforesaid reasons it was, at the time of the designing and construction of said building at said water works station, the purpose of the City to replace said worn-out

machinery at its electric light plant located at Tenth and Reynolds Streets with turbo generating electric machinery located in said building at said pumping station and to operate its electric lighting plant and its water works plant in combination.

That at the time of the commencement of the operation of said 705 KVA generator the street lighting system of said City, and particularly a large portion of the street lamps forming a portion thereof, were of such style and type that the same could not be operated by the current supplied from said generator; that said lamps
35 were of an old and antiquated type, inadequate for proper street ligting and expensive of operation; that the City thereupon began, and has since completed, the installation of street lamps and a distribution systems of late and efficient type and economical of operation, now supplied with current from said 750 KVA generator, and an additional turbo generator of like size and type subsequently installed at said pumping station.

It shows that such current as is now generated from said generator and not required for city purposes is sold by said City to private consumers for hire, at a price about one half the cost at which like current can be otherwise obtained by private consumers in said city, and it denies that such sales of such current are in any way violative or — *i*-ntravention of law.

IX.

Furthering answering, it denies that its operation of said plant or its sales of current generated thereat is in anyway governed by the Act of the Legislature, or Section 55 thereof, designated in said amended bill of complaint as the Public Utilities Act," and it denies that Section 10 of said Act is void or in violation of the Constitution of this State or that of the United States.

X.

Further answering, it denies that said City has never printed or kept open to public inspection, schedules showing all rates and other charges and classifications which are in force at the time for current as produced and sold by it in the operation of said plant.

XI.

Further answering, it denies that it has violated any law of this State relative to the publishing or posting of schedules of rates and denies that it is producing, generating, distributing and sell-
36 ing electricity without complying with any or all laws relative thereto.

XII.

Further answering, it says that it is not advised as to the kind or character of the commercial enterprise carried on by the complainant, or as to whether the enterprise so carried on by it is the same kind as

hat carried on by the City in the production, generation, distribu-ion and sale of the electric current, and therefore as to said allega-ions, and each and all of them it neither affirms nor denies the ame, but asks that strict proof be made thereof.

XIII.

Further answering, it denies that it has been soliciting patrons of omplainant to cease purchasing electricity from complainant, and hows that said City now is, and for many years last past has been, elling its surplus electric current at a reasonable profit and that it ow has, and for many years last past has had, more applications or such service than it was able to supply; that while the City is elling its excess current at about one half the rates purported to be harged by complainant, it has at all times sold such current at a rofit and that during the year now next last past such profits agree-ated many thousand dollars.

XIV.

Further answering, it denies that the rates and charges actually harged and collected by complainant have been filed and published by it in accordance with the provisions of said Public Utilities Act, and denies that the rates and charges filed by complainant as a com-pliance with the provisions of said Act are in fact the rates and charges actually charged and collected by it.

This defendant denies that the complainant is entitled to
37 the relief, or any part thereof, in said amended bill of complaint demanded, and prays the same advantages of this answer if it had pleaded or demurred to said amended bill; and prays to be dismissed with its reasonable costs in this behalf most wrongfully sustained.

CITY OF SPRINGFIELD,
By ROY M. SEELEY,
STEVENS & HERNDON,
Solicitors for Defendant.

And afterwards to wit, on the 6th day of April A. D. 1918, there was filed in the office of the Clerk of the Sangamon County Circuit Court certain exceptions to answer; a copy of said exceptions being in the words and figures as follows, to wit:

38 STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, March Term, A. D. 1918.

In Chancery.

SPRINGFIELD GAS AND ELECTRIC COMPANY

vs.

THE CITY OF SPRINGFIELD.

Exceptions Taken by the Complainant to the Insufficient and Impertinent Answer of the Defendant to the Complainant's Amended Bill of Complaint.

I.

The said answer is insufficient in that the defendant has not to the best of its knowledge, remembrance, information and belief, answered and set forth, in response to Paragraph 1 whether it is admitted or denied whether the complainant is a corporation, organized under the laws of the State of Illinois with the charter powers in said Paragraph 1 set forth.

II.

For that the said answer is impertinent in following allegation:

"Further answering, it says that no license, contract or franchise of any kind has ever been granted by said City to said complainant, and that as to the transfer, or the legality thereof if any, to said complainant or any license contract granted by said City to a grantee or grantees other than said complainant it is not advised, and
39 therefore neither affirms nor denies, but demands strict proof of the legality of such license contract and the transfer thereof to the complainant."

Said impertinence consists in this, that such paragraph traverses no material allegation in the bill, is a mere conclusion of the pleader, and sets up no new matter material to defendants defence.

III.

Said allegation last above set forth is insignificant for that defendant has not, in the manner aforesaid answered and set forth whether complainant has by virtue of licenses and ordinance contracts acquired, owned and operated its plant, but on the contrary said allegation is evasive, and a mere negative pregnant.

IV.

So much of said Paragraph II of said answer as is in the following language:

"That it is the general report that said plant is owned and so op-
rated by an association or corporation styling itself the Springfield
as and Electric Company, but that as to the existence of such asso-
iation or corporation as a corporation, or as — its ownership, or con-
ol of such plant, or as to the compliance by said corporation, if a cor-
oration, with the provisions of an Act of the General Assembly of
e State of Illinois, entitled "An Act to provide for the regulation
public utilities," approved June 30, 1913, this defendant is not
dvised, and therefore neither affirms nor denies said allegations, and
ch of them, but demands strict proof thereof."

insufficient for that defendant has not, in the manner aforesaid
swered and set forth whether said plant is owned and operated by
mplainant, or whether complainant has complied with the pro-
sions of the Act of the General Assembly of the State of Illinois
ferred to in Paragraph II of said amended bill, but on the contrary,
id answer is evasive and neither admits nor denies the allegations
said amended bill of complaint concerning matters and things
ncerning which defendant has information, knowledge and be-
f.

V.

So much of Paragraph II of said answer as is in the following lan-
age:

"As to the compliance by said corporation, if a corporation, with
e provisions of an Act of the General Assembly of the State of
inois, entitled "An Act to provide for the regulation of Public
ilities," approved June 30, 1913, this defendant is not advised, and
erefore neither affirms nor denies said allegations and each of them,
t demands strict proof thereof."

insufficient in that the defendant has in Paragraph XIV of its said
swer admitted that complainant has filed its schedule of rates and
arges as a compliance with said Act, and said evasion of affirmance
denial in said Paragraph II in the words above quoted is therefore
o impertinent.

VI.

For that the whole of Paragraph IV of the said answer is im-
rtinent.

VII.

For that the whole of Paragraphs VI, VII, and VIII of said an-
er, except the admission in the last paragraph of VIII that current
sold by defendant to private consumers for hire, is and are imperti-
nt.

VIII.

For that Paragraph IX of said answer is both insufficient and im-
rtinent in that nothing is said Paragraph IX set forth constitute-

any defence to the matters alleged in the bill, and said Paragraph IX is a mere incorrect conclusion of law of the pleader, and amounts to no answer to said bill, but its real and true force and effect is that of a demurrer to the substantive allegations of the amended bill of complaint, and as such the Court should take and consider said Paragraph IX.

IX.

All of Paragraph X of said answer is insufficient, for that the defendant has not in manner aforesaid answered and set forth
41 whether the defendant has published and posted schedules of rates as provided by Section 34 of said Public Utilities Act, but said Paragraph X of said Answer is a mere evasive negative pregnant of and concerning Paragraph VIII of said amended bill of complaint.

X.

Paragraph XI of said answer is insufficient and impertinent, being a conslusion of law of the pleader, raising an issue of law, and being also a demurrer to the amended bill of complaint and should be given affect as such.

XI.

Paragraph XII of said answer is insufficient, being a mere evasion of a direct, true and circumstantial answer to Paragraph X of said amended bill of complaint, for that defendant has not, in manner aforesaid answered and set forth whether defendant is engaged in and carrying on the same kind of commercial enterprise as complainant in the production, generation, distribution and sale of electricity as alleged in said Paragraph X of said amended bill of complaint.

XII.

Paragraph XIII of said answer is insufficient for that the defendant has not in manner aforesaid answered and set forth whether defendant has been soliciting patrons of complainant to purchase electricity from defendant at rates and charges not filed or published by defendant in compliance with the Public Utilities Act and whether former patrons of complainant have become patrons of defendant, purchasing electricity generated, distributed and sold to them, by defendant, and paying rates and charges therefor, which are not and never have been filed and published in compliance with the provisions of said Public Utilities Act, all as set forth in Paragraph XI of said amended bill of complaint, but said paragraph XIII of said answer is a mere evasive negative pregnant pretended answer to the allegations of said Paragraph XI of said bill of complaint.

XIII.

Said Paragraph XIII of said answer is impertinent from and inding the word "shows" in third line of said Paragraph XIII.

XIV.

Said Paragraph XIV of said answer is impertinent from the word rther" in the first line thereof down to the word "This" at the beaning of the last paragraph of said Paragraph XIV.

XV.

The entire answer, and each and every part thereof is insufficient that it does not set up any matter constituting a defense to the atters alleged in the amended bill of complaint.

XV.

The entire answer, after having had expunged therefrom those rtions and parts which are impertinent is insufficient in that it does t set up any matter constituting a defence to the matters alleged in nended bill of complaint.

XVI.

The entire answer, after having expunged therefrom those parts nd portions which are impertinent is insufficient in that while in rm an answer, it tenders no issue or issues of fact, but in face tenders mere issue of law as to whether any case is made or stated by said nended bill of complaint cognizable by this Court, and therefore in truth and fact a demurrer to said amended bill of complaint nd should be considered, held and treated as such, and the Court ould so hold and rule, and should pass upon the legal question so ised as if a formal demurrer had been filed by said defendant.

In all which particulars named as insufficient, complainant excepts the answer of defendant as evasive, imperfect and insufficient, and ays that the defendant, as to such matters may be compelled to put in a full and sufficient answer thereto.

3 And in all which particulars named as impertinent, the complainant insists the same ought to be expunged from said nswer.

And complainant insists that after expunging said parts or porions so impertinent, the said supposed answer is in truth and fact nd should be held and considered to be a demurrer to said amended ill of complaint, and should be ruled and passed upon and acted pon as such demurrer.

WILLIAM L. PATTON,
P. B. WARREN,
Solicitors for Complainant.

44 And afterwards to-wit on the 3rd day of May A. D. 1918, the same being one of the term days of the March Term A. D. 1918 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

45 And afterwards to-wit on the 8th day of August A. D. 1918, the same being one of the term days of the May Term A. D. 1918 of the Sangamon County Circuit Court, the following Order was had and entered of record to-wit:

Order of Court.

"It is ordered by the Court that all causes, motions, etc., not otherwise and finally disposed of, be continued to the next term of this Court."

"It is ordered that Court adjourn until Court in Course."

46 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. E. S. Smith, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the second day) of September in the year of our Lord One Thousand Nine Hundred and Eighteen.

Present:

Hon. E. S. Smith, Judge.
C. F. Mortimer, State's Attorney.
J. A. Wheeler, Sheriff.
Chas. L. Koehn, Clerk.

47 And afterwards to-wit on the 20th day of September A. D. 1918, the same being one of the term days of the September Term A. D. 1918 of the Sangamon County Circuit Court, the following among other proceedings were had and entered of record to-wit:

SPRINGFIELD GAS AND ELECTRIC COMPANY, Complainant,

vs.

THE CITY OF SPRINGFIELD, Defendant.

Injunction.

This day come the parties in the above entitled cause by their respective solicitors, and the said complainant by its solicitors submits its exceptions to the answer of the defendant to the complainant's amended bill.

And now this cause coming on to be heard in open Court upon the amended bill, answer to amended bill and the exceptions to the answer, and the Court having heard the arguments of counsel in part, and the time for adjournment of Court having arrived, it is ordered by the Court that the arguments of counsel be continued until to-morrow.

48 And afterwards to-wit on the 21st day of September A. D. 1918, the same being one of the term days of the September Term A. D. 1918 of the Sangamon County Circuit Court, the following among other proceedings were had and entered of record to-wit:

SPRINGFIELD GAS AND ELECTRIC COMPANY, Complainant,

vs.

THE CITY OF SPRINGFIELD, Defendant.

Injunction.

And now on this day come again the parties in the above entitled cause by their respective solicitors, and the arguments of counsel upon the amended bill, answer to amended bill and exceptions to said answer, are resumed.

And the Court having heard the remaining arguments of counsel, and the arguments being now concluded, the Court takes this cause under advisement.

* * * * * * *

49 And afterwards to-wit on the 1st day of October A. D. 1918, the same being one of the days of the September Term A. D. 1918 of the Sangamon County Circuit Court, the following among other proceedings were had and entered of record to-wit:

SPRINGFIELD GAS AND ELECTRIC COMPANY, Complainant,

vs.

THE CITY OF SPRINGFIELD, Defendant.

Injunction.

And now on this day come again the parties in the above entitled cause by their respective solicitors, and this cause having been heretofore submitted to the Court upon the amended bill, answer thereto and the exceptions to said answer and taken under advisement by the Court, and the Court being now on this day fully advised, it is ordered by the Court that this cause be dismissed for want of equity at the costs of the complainant.

And it is therefore ordered, adjudged and decreed by the Court that complainant's bill be and the same is hereby dismissed for want of equity, and that its action be barred and that the said complainant pay the costs of this case, and that the said defendant have and recover of and from the said complainant, its costs, by it herein expended and that it have execution therefor.

To which order, judgment and decree of the Court the said complainant by its solicitors then and there excepts and prays
50 and appeal of this cause to the Supreme Court of the State of Illinois, which is allowed by the Court upon the said complainant filing an appeal bond in the sum of Two Hundred Dollars ($200.00) in thirty (30) days from this date.

51 And afterwards to-wit on the 2nd day of October A. D. 1918, the same being one of the Term days of the September Term A. D. 1918 of the Sangamon County Circuit Court, the following among other proceedings were had and entered of record as follows, to-wit:

SPRINGFIELD GAS AND ELECTRIC COMPANY, Complainant,

vs.

CITY OF SPRINGFIELD, Defendant.

Injunction.

On this day comes the complainant by its solicitors, and presents and files its Appeal Bond to the Supreme Court of the State of Illinois, which is approved by the Court; said Appeal Bond being in words and figures as follows, to-wit:

52 *No.* 111. *Appeal Bond.*

Know all men by these presents, that we, Springfield Gas and Electric Company and American Surety Company of New York of

e County of Sangamon and State of Illinois, are held and firmly
nd unto The City of Springfield in the penal sum of Two Hun-
ed (200) Dollars, for the payment of which, well and truly to be
de, we and each of us bind ourselves, our heirs, executors and
ministrators, jointly and severally, firmly by these presents.
Sealed with our seals and dated at Springfield, Illinois this second
y of October in the year of our Lord one thousand nine hundred
d eighteen.
The conditions of the above obligation is such, that whereas the
d The City of Springfield did on the first day of October, A. D.
18, at a Term of the Circuit Court of Sangamon County, State of
inois, holden within and for said county, obtain a judgment
ainst the above bounden Springfield Gas and Electric Company,
smissing its bill theretofore filed for want of equity and for the
ts of suit from which decree and judgment, the said Springfield
s and Electric Company has prayed for and obtained an appeal
the Supreme Court of said State of Illinois.
Now, if the said Springfield Gas and Electric Company shall duly
osecute said appeal, and shall, moreover pay the amount of the
ree, judgment, costs, interest and damages rendered and to be
dered against it the said Springfield Gas and Electric Company
case the said decree and judgment shall be affirmed in the said
preme Court, then the above obligation to be null and void;
herwise to remain in full force and virtue.

[CORPORATE SEAL.]

SPRINGFIELD GAS & ELECTRIC CO., [SEAL.]
By A. D. MACKIE,
Vice Pres.
[SEAL.] AMERICAN SURETY COMPANY OF
NEW YORK, [SEAL.]
By R. W. TROXELL,
Res. Vice Pres. [SEAL.]

Attest to seal:
E. E. CORKEN,
Secretary.

Attest:
P. B. WARREN,
Res. Asst. Secy.

[Endorsed:] 32365. Sangamon Circuit Court, September Term,
18. Springfield Gas and Electric Company vs. The City of Spring-
ld. Appeal Bond to Supreme Court. Filed Oct. 2, 1919. Chas.
Koehn, Clerk. Bond approved and ordered filed this 2nd day
October, 1918. E. S. Smith, Judge.

And afterwards to-wit on the 15th day of October, A. D.
1918, there was filed in the office of the Clerk of the San-
mon County Circuit Court, a certain Notice and Præcipe for

Record to the Supreme Court; a copy of said Notice, together with the acknowledgment of said Notice, and a copy of said Præcipe being in the words and figures as follows, to-wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, to the September Term, 1918.

Gen. No. 32365.

SPRINGFIELD GAS AND ELECTRIC COMPANY

vs.

CITY OF SPRINGFIELD.

To the City of Springfield and to A. D. Stevens, its Solicitor:

You will please take notice that on the 15th day of October 1918, in the office of the Clerk of the above named Court at the Court House in Springfield, Illinois, we will file a præcipe for a record for use in the appeal of the above entitled cause to the Supreme Court of Illinois, and attached hereto is a copy of the præcipe which we propose then and there to file.

Dated this 9th day of October, 1918.

54

P. B. WARREN,
WILLIAM L. PATTON,
Solicitors for Appellant.

Springfield, Illinois.

We, as solicitors for the City of Springfield, the above named defendant, hereby acknowledge receipt of the above notice and copy of præcipe this 9th day of October, 1918.

A. D. STEVENS &
B. L. CATRON,
Solicitors for Defendant, City of Springfield.

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court, to the September Term, 1918.

Gen. No. 32365.

SPRINGFIELD GAS AND ELECTRIC COMPANY

vs.

CITY OF SPRINGFIELD.

To Charles L. Koehn, Clerk of said Court:

You will please prepare a record for appeal in the above entitled cause, and will incorporat-*ion* therein, the following:

1. Placita November Term, 1915.
2. Summons.
3. Placita January Term, 1918.
4. Order of Court granting leave to amend bill dated February 1918.
5. Amended bill filed February 7, 1918.
6. Placita March Term, 1918.
7. Answer to amended bill, filed March 18, 1918.
8. Exceptions to answer, filed April 6th, 1918.
9. Placita September, 1918.
10. Order showing arguments and taking cause under advisement, ated September 20 and 21, 1918.
11. Order dated October 1st, 1918, dismissing bill, etc.
12. Bond for Appeal.
13. Order dated October 2, 1918, approving bond.
14. Certificate of Clerk to transcript of record.

P. B. WARREN,
WILLIAM L. PATTON,
Solicitors for Complainant, now Appellant.

STATE OF ILLINOIS,
Sangamon County, ss:

I, Chas. L. Koehn, Clerk of the Circuit Court within and for the unty of Sangamon in the State of Illinois, and keeper of the rec-ds and seal of said Court, do hereby certify that the foregoing is a

true, perfect and complete Transcript of the Record and Proceedings as specified in the Præcipe for Record in a certain cause lately pending in said court on the Chancery side thereof, wherein Springfield Gas and Electric Company is Complainant and City of Springfield is Defendant, as the same appears from the records and files of said court in my office remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield, this 29th day of October A. D. 1918.

[SEAL.] CHAS. L. KOEHN,
Clerk.

57 *Assignment of Error.*

And now comes Springfield Gas and Electric Company, appellant, and shows to the Court here that there is manifest error in the record herein in this, that is to say:

1. The Court erred in holding that the exception of "such public utilities as are or may hereafter be owned or operated by any municipality," contained in Section 10 of the Act entitled, "An Act to provide for the regulation of public utilities," approved June 30, 1913, in force January 1, 1913, from the general operation of said Act is constitutional and valid.

2. The Court erred in not holding that said exception is unconstitutional and invalid as being in violation of the 14th Amendment to the Constitution of the United States and of Section 22, Article IV of the Constitution of the State of Illinois.

3. The Court erred in sustaining the demurrer of appellee to the bill of complaint for want of equity.

4. The Court erred in not overruling said demurrer.

5. The Court erred in entering a decree dismissing the bill of complaint for want of equity, and for costs against appellant for that the Court should have held and found that the said bill of
58 complaint set forth sufficient grounds for the relief prayed.

6. The Court erred in not entering a decree in accordance with the prayer of said bill of complaint.

7. The Court erred in holding and finding that said exception referred to in Assignment of Error No. 1, excepts public utilities owned or operated by any municipality, the product of which is sold to private consumers for hire or charge, in such operation and capacity from the terms and provisions of said Act.

8. The Court erred in not holding, finding and decreeing that public utilities owned or operated by any municipality, the product of which is sold to private consumers for hire or charge, are, in such capacity, subject to the terms and provisions of said Act.

9. The Court erred in not holding, finding and decreeing that so much of Section 1 of an Act entitled, "An Act to authorize cities to acquire, construct, own and lease or operate public utilities and to provide the means therefor," approved June 26, 1913, in force July 1, 1913, as authorizes such cities "to fix rates and charges for the service rendered by such public utilities; and to make all needful rules and regulations in relation thereto," was not repealed and superseded by the Act entitled, "An Act to provide for the regulation of public utilities," approved June 30, 1913, in force January 1, 1914, upon the going into force of said last named Act.

10. The Court erred in that after properly taking and considering the cause on bill, answer and exceptions, it did not enter a decree granting the relief prayed by said bill of complaint.

11. The Court erred in that after properly taking and considering the cause on bill, answer and exceptions, it entered a decree dismissing the said bill of complaint for want of equity, and for costs against appellant.

12. Forasmuch as the construction of the pleadings adopted by the Court, and the taking and considering the cause on bill, answer and exceptions, and acquiesced in by appellee, was in legal effect a sustaining of the exceptions to the answer, and a hearing, considering and decision of the cause on the bill and such portions of the answer as were not excepted to, and forasmuch as no exceptions were preserved by or available to the appellee on account of the failure of the Court to rule appellee to file an amended answer, the Court erred in entering the decree dismissing the bill for want of equity, inasmuch as the Court should, upon a proper construction of the bill with reference to the constitutionality of said exception in Section 10 of said Act, have entered a decree granting the relief prayed.

Wherefore, for the reasons above set forth, and which the record will sustain, the judgment and decree of said Circuit Court of Sangamon County ought to be reversed, with directions to said Court to enter a decree granting the relief asked and prayed for in the said amended bill of complaint.

WILLIAM L. PATTON,
P. B. WARREN,
Solicitors for Appellant.

61 Tuesday, December 17, 1918.

12502.

SPRINGFIELD GAS & ELECTRIC COMPANY, Appellant,

vs.

THE CITY OF SPRINGFIELD, Appellee.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

62 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the First Day of April, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, within and for the State of Illinois.

Present:

Chief Justice Warren W. Duncan.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Frank K. Dunn.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL,
Clerk.

Be it remembered, that afterward, to wit: on the 15th day of April, 1919, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to wit:

No. 12502.

SPRINGFIELD GAS & ELECTRIC CO., Appellant,

v.

THE CITY OF SPRINGFIELD, Appellee.

Error to —.

Appeal from Circuit Court, Sangamon.

3 Docket No. 12502—Agenda 52—December, 1918.

THE SPRINGFIELD GAS AND ELECTRIC COMPANY, Appellant,

v.

THE CITY OF SPRINGFIELD, Appellee.

Mr. Justice DUNN delivered the opinion of the court:

The question argued in this case is whether or not a municipality f this State owning and operating an electric light plant for the roduction and sale of electricity to private consumers is subject to ie supervision of the Public Utilities Commission. The city of pringfield owns and operates an electric light plant and sells elec- icity not required for city purposes to private consumers at about alf the cost for which it can be procured from other sources. The pringfield Gas and Electric Company is a corporation engaged in ie production and sale of electricity in the city of Springfield in nformity with the provisions of the Public Utilities act. It filed a ll against the city alleging that the city was engaged in the pro- uction and sale of electricity to private consumers, in violation of ction 35 of the Public Utilities act, without having complied with ie provisions of sections 33 and 34, which require the filing with ie Public Utilities Commission and the printing, posting and keep- g open to public inspection, of schedules showing all rates, charges id classifications in force for any product furnished, or service in nnection therewith performed, by any public utility. The city ed an answer, to which the appellant excepted. There was a hear- g on the bill, answer and exceptions, and the court entered a decree smissing the bill for want of equity, from which the complainant ppealed.

The theory of the bill is that the appellant and the appellee are mpetitors in business, each operating a public utility and subject to e Public Utilities act; that the appellee, not having complied with e requirements of the act, is prohibited by its terms from engaging in the business, and that appellant is entitled to an injunc- tion to pervent the illegal competition. The appellee has not argued that the appellant is not entitled to the relief if the mpetition is illegal, and it has been held that a corporation law- lly operating a public utility may have an injunction against an-

other corporation operating without authority of law a similar utility which competes with and injures the former's business. (Memphis Street Railway Co. v. Rapid Transit Co. 133 Tenn. 99; Millville Gas Light Co. v. Vineland Light and Power Co. 72 N. J. Eq. 305; Bartlesville Electric Light and Power Co. v. Bartlesville Interurban Railway Co. 26 Okla. 457; Ashley Tri-County Mutual Telephone Co. v. New Ashley Telephone Co. 92 Ohio St. 336; Farmers' Telephone Co. v. Boswell Telephone Co. (Ind.) 119 N. E. Rep. 513). The appellee, however, contends that it is expressly excepted from the terms of the Public Utilities act by section 10, which, in defining a public utility as including among others every corporation owning or operating a plant used for the production, transmission or sale of electricity, except "such public utilities as are or may hereafter be owned or operated by any municipality." The appellant contends that this exception, if applicable to the business of the city in furnishing electricity to private consumers, is a violation of the limitation contained in section 22 of article 4 of the State constitution, which prohibits the legislature from passing any local or special law granting to any corporation, association or individual any special privilege, and of the fourteenth amendment to the Federal constitution, which prohibits the States from denying to any person the equal protection of the laws.

In operating an electric light plant and selling electricity to individuals the city is not exercising its governmental powers but its private or proprietary rights, and its duties and liabilities are the same as those imposed by law upon individuals engaged in the same business. It was so held in regard to the furnishing of water and gas in Wagner v. City of Rock Island, 146 Ill., 139, where
65 we said (p. 154): "A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation and not in the exercise of its powers of local sovereignty. If this power is granted to a borough or city it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. In separating the two powers, public and private, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively they belong to the corporate body in its public, political or municipal character; but if the grant was for purposes of private advantages and emolument, though the public may derive a common benefit therefrom, the corporation quo ad hoc is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." (City of Chicago v. Selz, Schwab & Co., 202 Ill., 545; Village of Palestine v. Siler, 225 id. 630.) In Butler v. Karb, 96 Ohio St. 472, it is said: "That neither public or private corporations may discriminate between members of the public with reference to rates and terms of service does not longer admit of controversy. This wholesome rule, long in force, has had frequent application, particularly to common carriers and utilities companies. A municipality operating a utility is not exempt therefrom. Acting in a proprietary capacity, we have seen, it should have the freedom of action of a private utility corporation, but it is also subject to the

ame restrictions as to practices of discrimination in rates and serv-
e." So far as a municipality is engaged in the commercial distri-
ution of electricity, its rights and liabilities, powers and duties are
easured by the same standard and governed by the same rules as
apply to private corporations similarly engaged.

6 There is no doubt that the exception of municipalities owning or operating public utilities from the operation of he Public Utilities act, which applies to every other corporation, ompany, association or individual, grants to such corporations a pecial privilege which such other corporations do not enjoy, and therefore obnoxious to the provision of the State constitution gainst special laws unless there exist some reasonable basis, having eference to the object of the legislation, for placing such munici-alities in a class by themselves. The constitutional provision does ot mean that the same rule shall apply to every individual in the tate under all circumstances but only under substantially the same ircumstances, and laws may be valid though operating only upon articular persons or classes of persons if there is a valid reason for uch particular operation. An arbitrary designation of persons is ot permissible. The only reason which is recognized as valid is substantial distinction which differentiates in important particulars, aving some reasonable and just relation to the purpose of the law, he particular persons to whom it applies from all other persons. People v. Kewanee Light Co., 262 Ill., 255.)

A municipal corporation has no authority either to sell electricity o private consumers or to fix the rate at which it shall be sold ithin the municipality in the absence of a statute enabling it to o so. In June, 1913, the General Assembly passed and the Gov-rnor approved a law which went into effect on July 1 and gave to ny city in the State the power to acquire, construct, own and operate any public utility the product or service of which,

7 or a major portion thereof, is or is to be supplied to the city or its inhabitants, and to contract for, purchase and sell to rivate persons or corporations products or service of such utilities nd to fix the rates and charges for the services rendered by such ublic utilities. (Laws of 1913, p. 455.) This statute does not onfer authority for the regulation of public utilities upon munici-alities. At the same session of the legislature another law was nacted which became effective on January 1, 1914, and is known s the Public Utilities act. (Laws of 1913, p. 459.) This act reated a Public Utilities Commission, to which it gave the general upervision of all public utilities and upon which extensive powers f regulation were conferred. Among many other things every ublic utility was prohibited from undertaking to perform any ervice or furnish any product or commodity unless or until the ates and other charges and classifications, rules and regulations re-ating thereto, applicable to such service, product or commodity, ave been filed and published in accordance with the provisions of he act. Such rates, charges or classifications, or any rule, regula-ion, practice or contract relating to or affecting any rate or other harge, classification or service, cannot be changed, unless the com-

mission otherwise orders, except after thirty days' notice to the commission and to the public; no increase in any rate or charge can be made except upon a showing before the commission and a finding by it that such increase is justified, and no greater or less rate can be charged for any product or service than that specified in the schedule at the time filed and in effect. Section 10 contained the clause which has been referred to, defining the term "public utility" and excepting utilities owned by municipalities from the definition. There is no doubt that the legislature intended that public utilities owned or operated by municipalities should not be under the supervision of the Public Utilities Commis-
68 sion or subject to its authority. There is no reason to suppose that this exemption was limited only to the operation of the utility in furnishing its product and service for the use of the municipality and did not extend to the entire operation. On the contrary, there was no occasion to except an electric light plant, for instance, which a city operated only for lighting the streets and public places and property and which had no private consumers. There was no need of all the detailed requirements of the Public Utilities act in the case of a municipality which is the only consumer of the product of its plant. The exception applies to utilities owned by municipalities and operated commercially.

The purpose of the Public Utilities act was the prevention of extortionate charges and unjust discriminations by public utilities. The authority to regulate public utilities is vested in the legislature, which may exercise it directly or through such governmental agencies as it may deem best. It might have given to each city in the State the power to regulate the rates to be charged by public utilities for their services, respectively, within the municipality. It did not do this but it enacted a law authorizing each city to enter upon the commercial business of operating public utilities and to fix its own rates, and it is not contended that this was beyond the legislative power. The Public Utilities act, though passed at the same session, did not go into effect until six months later, and if there is any inconsistency between them the later act must prevail. This act placed all public utilities under the supervision of the commission, and if the exception of utilities owned or operated by a municipality cannot be given effect the acts are inconsistent. The one gives the Public Utilities Commission supervision of the business of public utilities and control of rates, while the other gives the municipality the entire supervision and control of the business of any public utility it may own and the regulation
69 of its rates and charges. The effect of the two statutes is that public utilities engaged in commercial operation are divided into two classes,—that is, those owned by a municipality and all others. The former have the privilege of operation without restriction or supervision by the State; the latter have not but must operate under the supervision and control of the Public Utilities Commission. Is the difference of ownership a reasonable basis, having reference to the purpose of the legislation, for the difference

a privilege? So far as this question is concerned there is no difference in the character or purpose of the business transacted. No municipal, political or governmental question is involved. The appellant and the appellee each owns and operates an electric plant and sells electricity for the purpose of profit to all persons who want to buy it. What relation has the ownership of their respective plants to the questions of unjust discrimination, extortionate charges and unequal or inferior service, which the Public Utilities act was intended to prevent? The consumers of the appellant's product may be the same persons as the consumers of the appellee's product, or neighbors side by side. They may be required to pay extortionate rates or different rates for the same service, or if they pay the same rate the service may be inferior. The appellant's customer has a remedy. He may apply to the Public Utilities Commission for relief, and if the facts justify it he is entitled to relief as a legal right. The appellee's customer has no remedy. He can apply only to appellee,—the very authority of whose action complaint is made. In the one case the controversy is submitted to a third party; in the other to one of the parties to the controversy. The appellee's claim with reference to this classification is contained in the following extract from its brief: "The legislature has adopted its own classification of public utilities by authorizing the municipalities to regulate and control municipal public utilities and the State Commission to regulate and control privately owned public utilities. This is a reasonable classification, based upon the different conditions arising under municipal and private ownership and operation. In the operation of a municipal public utility the public officials are conducting the business for the people themselves, who are in a position to obtain such rates and regulation as may be reasonably required. On the other hand, privately owned utilities can only be controlled by an independent body, such as a State commission or other agency."

The persons who use the products or service of public utilities are entitled to the benefit of the Public Utilities act, and are entitled to its protection against extortion, discrimination and inferior service, by whomsoever furnished. The furnishing of such service is an ordinary commercial business by whomsoever undertaken. Whether a public utility is owned by a private corporation or a municipal corporation, its relation to its customers is not different. They are under the same compulsion to use its service, are at its mercy to the same extent. If a customer is oppressed by extortionate charges or discriminated against by a wrongful rate or inferior service, the wrong is the same whether done by a municipal corporation or a private corporation. The difference in ownership does not change the character of the wrong done or justify the refusal of a prompt, adequate and complete remedy in one case which is granted in the other. The fact that by organizing with others complaining customers may be able at some future election to secure a change of administration which will perhaps have the ability and sense of justice voluntarily to correct the wrong does

not justify putting municipally owned public utilities in a
71 class separate from other competing public utilities and relieving them from the supervision of the Public Utilities Commission.

The clause which excepts municipally owned or operated public utilities from the definition of a public utility in section 10 of the Public Utilities act is unconstitutional. Section 83 of the act provides that "if any section, subdivision, sentence or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not effect the validity of the remaining portion of this act." The act can be effectively carried out after eliminating the unconstitutional clause, and it is not necessary to declare the whole act unconstitutional.

The appellant's exceptions to the answer should have been sustained. The decree will be reversed and the cause remanded, with directions to sustain the exceptions to the answer. The appellee may file an amended answer should it be so advised.

Reversed and remanded, with directions.
Duncan, C. J., and Stone, J., dissenting.

72 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the First Day of April, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, Within and for the State of Illinois.

Present:

Chief Justice Warren W. Duncan.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Frank K. Dunn.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered that to-wit: on the 15th day of April, A. D. 1919, the same being one of the days of the said April term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

April 15th, A. D. 1919.

No. 12502.

SPRINGFIELD GAS & ELECTRIC COMPANY, Appellant,

vs.

THE CITY OF SPRINGFIELD, Appellee.

Appeal from Circuit Court of Sangamon County.

Error to —.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid; as the matters and things therein assigned for Error, and now, being sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is Manifest Error: Therefore, it is considered by the Court that for that Error and others in the record and proceedings aforesaid, the decree of the Circuit Court of Sangamon County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Sangamon County with directions to sustain the exceptions to the answer.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs by it in this behalf expended, to be taxed, in due course of law.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

—— ——.

73 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the Third Day of June, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, Within and for the State of Illinois.

Present:

Frank K. Dunn, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered that to-wit: on the 4th day of June, A. D. 1919, the same being one of the days of the said June Term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

12502.

SPRINGFIELD GAS & ELECTRIC CO.

vs.

CITY OF SPRINGFIELD.

Now on this day the Court having considered motion of certain parties to file petition herein and the Court being advised in the premises overrules and denies the motion.

And the Court having considered the petition for rehearing filed herein and being now fully advised in the premises doth grant the prayer of the petition and allow a rehearing of this cause.

Wednesday, June 18, 1919.

12502.

SPRINGFIELD GAS & ELECTRIC COMPANY, Appellant,

vs.

THE CITY OF SPRINGFIELD, Appellee.

Now on this day come the parties hereto and this being one of the
rs set apart for the call of the docket under the rules of this Court,
d it appearing to the Court that a rehearing having been allowed
d appellant, hath filed herein a duly certified transcript of the
ord and proceedings of the Court below, together with printed ab-
cts thereof, and briefs and arguments of counsel in support of the
ors assigned herein, and entered motion to reverse the judgment
d remand said cause and for costs, and the said appellee having
ered motion to affirm said judgment and for costs and procedendo,
d said motions being taken under advisement for final hearing,
d the Clerk of this Court reporting that said cause is now ready to
aken, and said cause on briefs, petition for rehearing, answer, and
ly is here submitted for the consideration and judgment of the
rt:

Therefore it is ordered by the Court that this cause be and the
ne is hereby taken under advisement.

UNITED STATES OF AMERICA,
State of Illinois, ss:

a Term of the Supreme Court, Begun and Held at Springfield on
Tuesday, the Third Day of February, in the Year of Our Lord One
Thousand Nine Hundred and Twenty, within and for the State
of Illinois.

Present:

Chief Justice Frank K. Dunn.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William F. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered, that afterward, to-wit: on the 18th day of February, 1920, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 12502.

SPRINGFIELD GAS & ELECTRIC CO., Appellant,

v.

THE CITY OF SPRINGFIELD, Appellee.

Error to —.

Appeal from Circuit Court, Sangamon.

76 Docket No. 12502. Agenda 73. June, 1919.

THE SPRINGFIELD GAS AND ELECTRIC COMPANY, Appellant,

v.

THE CITY OF SPRINGFIELD, Appellee.

Mr. Justice DUNCAN delivered the opinion of the court:

Appellee, The City of Springfield, owns and operates an electric light plant, produces electricity for its own use and sells electricity not required for its purposes to private consumers at about one-half of the cost for which it can be procured from other sources. Appellant is a private corporation engaged in the production and sale of electricity in the City of Springfield and has complied with the provisions of the Public Utilities act. It filed its bill for an injunction against appellee in the Circuit Court of Sangamon County, alleging in substance that appellee in its production and sale of electricity to private consumers is violating section 35 of the Public Utilities act providing that no public utility shall undertake to perform any service or to furnish any product or commodity unless and until the rates and other charges and classifications, rules and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of that act. Also, that appellee is violating sections 33 and 34 of said act which require the filing with the Public Utilities Commission and the printing, posting and keeping open to public inspection of schedules showing all rates, charges and classifications in force for any product furnished or service rendered by its as such public utility. The city filed an answer to which appellant filed exceptions. There was a hearing on the bill, answer and exceptions and the court entered a decree dismissing the bill for want of equity.

77 The theory of the bill is that appellant and appellee are competitors in business and are operating public utilities and are both subject to the Public Utilities act; that appellee, not having

complied with the requirements of the act, is prohibited by its terms from engaging in the business; and that appellant is entitled to an injunction to prevent the illegal competition. The parties have created the issues in this case as questions of law, precisely as if they had arisen on a demurrer to the bill. In disposing of this appeal the court will also indulge in that same assumption. The question for decision in the case is whether or not a municipality in this state owning and operating an electric light plant for the production of electricity for its own use and also for the sale thereof to private consumers is subject to the provisions of the act and to the supervision of the Public Utilities Commission.

We are disposed to agree with the proposition of appellant that a private corporation lawfully operating a public utility may have an injunction against another private corporation operating without authority of law a similar utility which competes with and injures the former's business. Municipal corporations, however, are expressly excepted from the terms and provisions of the Public Utilities act by section 10 thereof and in a very emphatic manner, so much so that there can be no question that the act was not intended to apply to any public utility owned by a City. The following definitions are found in said section 10:

"The term 'public utility,' when used in this act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever, (except, however, such public utilities as are or may hereafter: (*a*) May own, control, operate or manage, be owned or operated by any municipality) that now or manage, within the state, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this State; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water: * * *

78 "The term 'company' when used in this act in connection with a public utility, includes any corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever, owning, holding, operating, controlling or managing such a public utility, but not municipal corporation.

"The term 'corporation' when used in this act, includes any corporation, company association, joint stock company or association, but not municipal corporations."

The Public Utilities act was passed June 20, 1913, as House Bill No. 907, and was approved June 30, 1913. It did not take effect until January 1, 1914, by special provisions, because of the fact that that time was considered necessary for the appointment of the Public Utilities Commission created thereby, and for the Railroad and Warehouse Commission to prepare its books and records to be taken over by the Public Utilities Commission. The Municipal Ownership act

was passed June 20, 1913, as Senate Bill No. 538, was approved June 26, 1913, and became effective July 1, 1913. By section 1 of the latter act, any city of this State is given the power to acquire, construct, own and operate any public utility, the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants; and to contract for, purchase and sell to private persons or corporations, the products or service of such utility; to fix rates and charges for the services rendered by such public utilities; and to make all needful rules and regulations in relation thereto. The term utility, when used in the act, is defined thereby to mean and include any plant, equipment or property, and any franchise, license or permit, used or to be used for the production, storage, transmission, sale, delivery or furnishing of cold, heat, light, power, or for the conveyance of oil or gas by a pipe line, etc.

Section 12 of the act provides that the charges for the service rendered by means of any public utility of any city shall be high enough to produce a revenue sufficient to bear all costs of maintenance and operation to meet interest charges on bonds and certificates is-
79 sued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity.

Section 13 thereof provides that the accounts for the public utility shall be kept distinct from other city accounts and in such manner as to show the true and complete financial results of such city ownership and operation; and so as to show the actual cost to such city of the public utility owned; all cost of maintenance, extension and improvement; all operating expenses of every description, and the amounts set aside for sinking fund purposes; and also reasonable allowances for interest, depreciation and insurance, and estimates of the amount of taxes that would be chargeable against such property if owned by a private corporation. It further provides that the city council shall cause to be printed annually for public distribution a report showing the financial results of such city ownership and operation, in form as aforesaid; and that the accounts of such utility, so kept, shall be examined once each year by an expert accountant who shall report to the city council the result of his examination.

As will be seen from the foregoing, the Municipal Ownership act is a complete act within itself authorizing cities to acquire, own and operate public utilities within their borders and to regulate the same and fix rates and charges as aforesaid, and the act furnishes the reason for excepting such public utilities from the jurisdiction of the Public Utilities Commission by the said provisions of section 10 of the Public Utilities act.

Appellant insists that if such public utilities owned and operated by cities should be held to be excepted from the jurisdiction of the Public Utilities Commission, as provided in said section 10, that such a construction would render that exception void, because in violation of section 22, article 4 of the state constitution, prohibiting the legislature from passing any local or special law granting to any
80 corporation, association or individual any special privileges, and also in violation of the 14th amendment to the Federal

constitution which prohibits the states from denying to any person the equal protection of the laws. In the determination of the validity or invalidity of particular provisions of public laws, courts should not be unmindful of the effect upon the entire enactment of the holding of any particular provision invalid. If the exception in said section 10 is of such import that the other sections of the Public Utilities act, without such exception, would cause results not contemplated or desired by the Legislature, then the entire statute must be held invalid if we hold the exception invalid. (Connolly v. Union Sewer Pipe Co., 184 U. S. 540). On the other hand, if said section 10 is held to be invalid and the balance of the act valid, then a large portion of the Municipal Ownership act must likewise be held to be invalid, as a bare inspection of the act will show.

The purpose of the Public Utilities act expressed in its title, is to provide for the regulation of public utilities. If municipal corporations are made subject to the act will a result be produced contrary to the intention of the legislature? The legislature, by the said exception in said section 10, has answered this question and has left nothing to inference, unless, as contended by appellant, section 83 of said act has expressed a different and controlling intention by this language: "If any section, subdivision, sentence or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act." The statute must be considered as a whole and the intention derived from a consideration of all of its clauses and provisions. The statute, we must infer, was adopted in accordance with a plan. State v. Gantz, 124 La. 535. This plan was that all private corpo-
81 rations owning and operating public utilities should be bound by all the provisions of the act, and that all municipal corporations should be excluded from the provisions of the act. Public Utilities owned and operated by municipalities were to be governed and controlled by the provisions of the Municipal Ownership act and regulated only by such municipalities. It is not possible to get away from these conclusions. To strike out the provisions of section 10 exempting municipalities from the terms and provisions of the Public Utilities act and to then hold that the remainder of the act is valid would be the making of a law by this court that the legislature never intended to make, and at the same time would be nullifying a large portion of the Municipal Ownership act which the legislature clearly intended should be and remain effective. While it is well settled by adjudications of this and other courts that if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded and valid sections allowed to stand and be in force; yet, it is also the inflexible rule that where a portion of an act is valid and a portion invalid, and the court can not say that the legislature would have passed the act with the void portion eliminated, then the entire act must be held invalid. (People v. McBride, 234 Ill. 146; Cornell v. People, 107 id. 372; Hinze v. People, 92 id. 406; People v. Cooper, 83 id. 585; Mathews v. The People, 202 id. 389; Kellyville Coal Co. v. Harrier, 207 id. 624.)

We cannot agree with appellant's contention that the saving clause

in section 83 of the act will justify this court in holding invalid section 10 without affecting the act as a whole. Said section 83 was not intended to nullify any rule of statutory construction and must receive a construction consistent with the rules of constitu-
82 tional law. While this section may be some indication of legislative intention, yet, in construing it we must give due consideration to the rules heretofore laid down by this court in the interpretation of statutes. (State v. Bancroft, 148 Wis. 124.) We cannot under such rules ignore the fact that the enforcement of this section to the letter would not only nullify the exceptions in section 10 aforesaid but would practically nullify the whole of the Municipal Ownership act.

The history of the legislation under consideration furnishes the court material aid in determining whether or not the legislature would have passed the act with the exception in section 10 eliminated. It appears from the Senate and House Journals as quoted by appellant, that the said two acts were introduced and passed as twin measures. They were passed after the legislative inquiry made by a committee appointed under a joint resolution, passed in 1911, authorizing an inquiry into public utilities and also municipally owned public utilities. A spirited contest appears to have been waged concerning the Public Utilities act in reference to the Senate's "Home Rule" amendments, giving to cities the right to regulate public utilities. The House refused to concur in those amendments and later the Senate receded from its amendments and permitted the House Bill to become a law, and the House permitted the Senate Bill to become a law. The Governor submitted the House Bill to the Attorney General for his opinion as to its form and constitutionality. In that opinion the Attorney General said: "The bill as originally framed provides for the exercise, by each city, of power and authority to regulate its own public utilities, but the provisions on that subject were stricken out before the bill was finally adopted. However, the General Assembly has passed Senate Bill No. 538, which, as I have already informed you, is constitutional and valid and which by its terms authorizes cities to own and operate public utilities within their limits, and section 10 of House Bill No.
83 907 especially exempts municipally owned or operated public utilities from the operation of the act." (Report and Opinions of Att'y Gen., 1913, 46.) The efforts of the Governor who signed these measures to get the Home Rule feature incorporated in the House Bill are well known by everybody who is familiar with the contest over these measures during the time they were pending in the legislature. It seems to us that the conslusion must follow that if the exception contained in section 10 had been stricken by amendment, the Public Utilities act never would have been passed by that legislature, as the act would then have authorized the Public Utilities Commission to regulate and fix rates for public utilities owned and operated by municipalities contrary to the provisions of the Municipal Ownership act. This court would, in our judgment, be virtually making a law by so amending the act and holding the Public Utilities act valid as amended. Courts have no powers to make laws.

If appellant's contention is correct that the exception in said section 10 creates a special or local law and grants special privileges in violation of our constitution, this court would have no alternative but to hold it invalid, even though in doing so we would be compelled to declare the entire Public Utilities act unconstitutional. But we do not agree with appellant's contention that exempting municipalities and public utilities owned and operated by municipalities from the provisions of said statute violates the constitution. The word "corporation," as used in section 22 of article 4 of our constitution does not include municipal corporations. (People v. Fox, 247 Ill. 402.) But municipal corporations may form a separate and distinct class from private corporations. The constitutional provisions does not mean that the same rule shall apply to every individual in the state under all circumstances but only under substantially the same circumstances, and laws may be valid though operating only upon particular persons or classes if there is a valid reason for such particular operation. (Condon v. City of Chicago, 249 Ill. 596; Tarantina v. Louisville and Nashville Railroad Co., 254 id. 624; Dawson Soap Co. v. City of Chicago, 234 id. 314; Douglas v. The People, 225 id. 536; Casparis Stone Co. v. Industrial Board 278 id. 77.) Of course, an arbitrary designation of persons is not permissible. The only reason which is recognized as valid is a substantial distinction which differentiates in important particulars the particular persons to whom it applies from all other persons, having some reasonable and just relation to the purpose of the law. (People v. Kewanee Light Company, 262 Ill. 255.) The basis of the two statutes in question for making two distinct classes of public utilities, those owned and operated by private corporations and those owned and operated by municipalities, is the supposition that there exists some valid reason why both of them can not or should not be subject to all the provisions of the Public Utilities act and be regulated and rates fixed for them in accordance with the provisions of that act. If such a valid reason does exist the legislature did not violate any constitutional provision in enacting two separate acts for the regulation and control of the two classes of public utilities. The legislature may classify persons or occupations for the purpose of legislative regulation and control provided such classification is not an arbitrary one and is based upon some substantial difference which bears a proper relation to the classification. (People v. Schenck, 257 Ill. 384.)

The purposes of the Public Utilities act were to prevent exorbitant rates, unjust discrimination and undue preferences in rates between different consumers and at the same time to protect public utilities from local influences which would compel them to render services at such low rates that efficient services to the public would be thereby impaired. To enable consumers to protect themselves against exorbitant rates and unjust discrimination without compelling them in the first instance to resort to their right to a hearing under the act on the question of rates, sections 33, 34 and 35 were incorporated in the Public Utilities act requiring the filing of schedules of rates and the posting and publishing of the

same. No such requirement is necessary for the protection of the consumer when the utility is owned and operated by the municipality. Before the enactment of the Public Utilities act the records of public utilities owned by private corporations or private persons were free from public inspection. Municipality speak only by their records which are always opens to inspection. Under section 1 of the Municipal Ownership act granting municipalities the power to own and operate public utilities and fix the rates and charges for the services rendered by them and to make all needful rules and regulations in relation thereto municipalities can only act by ordinances and resolutions passed in the manner required by statute. Municipalities under the Municipal Ownership act are limited in rates and charges for the product furnished by their public utilities and can not operate them at a profit to the same extent as can private corporations, associations or persons owning like utilities. They are required under the act governing them to keep separate accounts of the moneys received from the operation of their utilities, and such funds can not be used as revenue except to discharge their obligations and expenses in the operation *and* the utilities. Their charges for such services are simply to be high enough to produce revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued on account thereof and to permit the accumulation of a surplus or sinking fund sufficient to meet all outstanding bonds or certificates at maturity issued on account of such utilities. The statute does not contem-
86 plate that the rates shall be higher or lower than for the purposes aforesaid, no matter what effect such rates and charges may have upon other corporations or persons owning or operating public utilities.

The legislature had the right and power to authorize and empower municipalities to own and operate public utilities. That is not questioned in this case. It is not questioned that the legislature had the power to prescribe the rates and charges or the limits of the same to municipalities, as it has done in the Municipal Ownership act. The right to fix rates for all public utilities is vested in the first instance in the state. The state has the right to prescribe rates and charges by private corporations and persons for the operation of public utilities that shall produce a reasonable profit or return over and above and on their entire investment and outlay, and on the other hand to limit the rates and charges of utilities owned by municipalities so that they will only be sufficient to meet outlays and expenses of every kind by reason of their ownership and operation, as provided by the Municipal Ownership act. It is contemplated that private corporations and persons shall realize profits. The legislature, had the right to assume that the rates and charges of each of these two classes of public utilities would not and could not be the same to consumers. It is clear, therefore, that the legislature acted within its constitutional rights and powers in enacting the said two statutes and making different provisions in so far as the same were necessary to accomplish the purposes for which the two acts were enacted. It is equally clear that the legislature had the right and power to delegate

to the municipalities the right of regulation and control of such municipally owned plants. Such right is clearly recognized not only in this state but in other states. It might have given the Public Utilities Commission the right to fix the rates and charges of plants owned by municipalities in accordance with the provisions of the Municipal Ownership act, as well as the right to regulate
87 and fix charges for privately owned public utilities under the Public Utilities act, had it seen fit to do so. The fact that it has designated municipalities as the proper bodies that shall regulate and fix the rates to be charged by utilities owned by them can furnish no cause for complaint to appellant, as the rates that appellant may charge under the Public Utilities act are necessarily fixed upon a different basis and may or may not be the same as the rates and charges that may be fixed under the Municipal Ownership act, even in the same city.

There is another reason for holding that neither of the two acts aforesaid violates section 22 of article 4 of our constitution or the 14th amendment to the Federal Constitution. A law is not local or special, in a constitutional sense, if it operates in the same manner upon all persons in like circumstances. "A law general in its character may extend only to particular classes and not be obnoxious to the provisions of the constitution if all persons of the same class are treated alike under similar circumstances and conditions. A law is general, not because it embraces all the governed, but that it may from its terms, when many are embraced in its provisions, embrace all others when they occupy like positions to those who are embraced. Such a law must be based upon some substantial difference between the situation of a class or classes and another class or classes to which it does not apply." (C. B. & Q. R. R. Co. v. Doyle, 258 Ill. 624.) When tested by the foregoing rules it will readily appear that the Public Utilities act does not violate the constitutional provisions aforesaid by reason of the exception in section 10. The Municipal Ownership act for the same reason is equally unobjectionable, so far as it is material to the issues in this case.

There is no reason for the contention of appellant that any part of the Municipal Ownership act is repealed by implication by the provisions of the Public Utilities act because the latter act was passed after the enactment of the former. Whether or not public utilities owned by municipalities shall be placed upon a different
88 basis from public utilities owned by private corporations, associations or persons, for regulation and for fixing their rates and charges, is a question solely for the legislature to determine, as is also the question whether or not they shall be regulated and rates fixed for them by different tribunals or by the same tribunal. There was a good and substantial reason for the legislature dividing public utilities into the two classes aforesaid and making laws specially applicable to each of them, as aforesaid. When we consider the acts in this light their several provisions are in complete harmony, and are not so antagonistic to each other in the matters complained of by appellant as to leave any reasonable ground for

the contention that any provision of the Municipal Ownership act is repealed by implication by any provision of the other act.

We have no disagreement with the general proposition argued by appellant that a municipal corporation which supplies its inhabitants with light, gas or water, does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. This general principle has been announced in a number of cases in this and other jurisdictions, mostly in cases for personal injuries arising on the question of the liability of cities operating municipally owned public utilities. We may concede that the operation by a municipality of an electric light plant for the furnishing of light or power to private consumers for gain can not in any sense be the performance of a governmental function. Such established principle can furnish no reasonable basis for appellant's argument in this case that such municipalities must be put in the same class with private corporations or persons operating public utilities for the purpose of regulation and of fixing their rates and charges in operating such public utilities. It might just as well be argued that corporations operating steam railroads should be put in the same class for all purposes of legislation with corporations operating street railroads, because they both carry for hire passengers and freight of all
89 kinds. (Chicago, Indianapolis and Louisville Railway Co. v. Railroad Commission, 173 Ind. 469.)

Appellant suggests that if we construe the said exception in section 10 of the Public Utilities act as simply excepting Municipal plants that only produce electricity for the use and requirements of the municipalities when acting in their governmental capacity such a construction would render the whole act valid. It is argued that such a construction is permissible under the well known rule that words in a statute may be modified, altered or supplied so as to obviate any repugnance or inconsistency with legislative intention, although in so doing particular provisions of an act may not be read or construed according to their literal reading. (Public Ut. Com. v. Monarch Co. 267 Ill. 528.) It is therefore urged that the exception should be read as if it were written, "except, however, such public utilities as are, or may hereafter be, owned or operated by any municipality for its own use." This contention is fully answered already, we think, by our showing that there is no such repugnance or inconsistency in these statutes to be obviated, and there is therefore no necessity for invoking the rule suggested. Besides it is clear that no such rule could be applied in any event without doing violence to the legislative intent. There can be no doubt whatever that the legislature intended that public utilities owned and operated by municipalities should not be under the supervision and regulation of the Public Utilities Commission in any way. There is also no reason for supposing that such municipally owned and operated plants as only produced electricity or other product for the use of the municipalities were intended to be excepted by said section 10. Such a utility would not be a public utility any more than would a utility owned and operated by a private individual for his own use exclusively. The term "public utility" implies a

ublic use carrying with it the duty to serve the public and treat ll persons alike, and it precludes the idea of service which is private in its nature and is not to be obtained by the public. 0 (Utilities Com. v. Bethany Tel. Ass'n, 270 Ill. 183.) No such private utility could be considered as being subject to he provisions of said act in the absence of any exception and the egislature can not be reasonably held to have made such a meanngless exception in this statute.

One of the statements made by appellant and upon which it bases n argument that section 10 aforesaid with its exceptions aforesaid s unconstitutional, is that "any legislation which pretends to reieve the city of the same burdens of regulation imposed upon rivate corporations or individuals engaged in like enterprise is nvalid." As we have already shown, municipally owned public tilities are not exempt from regulation by the Municipal Ownerhip act as to rates and charges, and they are not exempt from the aking of rates and charges that are reasonable and just and uniorm, for the same amount and character of service. Under the lunicipal Ownership act the consumers are just as completely proected from exorbitant rates and unjust discrimination as the conumers are under the Public Utilities act. If the consumers had o depend entirely upon the municipalities to be kept free from the ffect of unjust and exorbitant rates and from unjust discrimination, hen there might be some reason for appellant's contention. The onsumers of the product of utilities of private corporations and rivate persons operating under the Public Utilities act may be ust as much subject to be burdened with exorbitant and unjust ates and unjust discrimination under the action of the Public Utilities Commission. If we are to assume that all public officials ould be corrupt and unfair or inefficient when acting in such apacity. The Public Utilities Commission may make serious misakes in rating and in regulating public utilities, and so may offiers of municipalities acting in a similar capacity. We have no eason to assume that either one will intentionally be corrupt or nfair. There is little or no reason why either body might be more nfair or corrupt than the other. But the consumers in either case have the right to appeal to the courts to correct such abuses 1 as may occur. Municipal Officers under the Municipal Ownership act can not discriminate in rates or make exorbitant nd unjust rates to consumers if they discharge their duties faithully, honestly and efficiently under that act. All their rates and harges fixed by ordinances or resolutions are subject to review by he courts to a like extent as the rates fixed by the Public Utilities Commission for public utilities privately owned, although the matter of review may be had under a different law and by a different emedy. (Butler v. Karb, 96 Ohio St. 472; City of Cincinnati v. Public Ut. Com., 98 id. 320; 2 Abbott on Municipal Corporations, . 1196.

The question whether or not appellant or any other public utility r person may be injured or the Public Utilities act violated by a

lessee of appellee is not in this case, as appellee has not leased and is not intending to lease its plant to any private corporation or person whatever, and appellant does not claim that there is to be such a leasing. Upon the same footing is the question of whether or not appellee may sell its products to persons residing outside its corporate limits. We must therefore regard all such discussions by appellant as serving no useful purpose in this case, and as not proper to be further considered by us in this opinion.

Municipal Ownership of public utilities may or may not be a wise policy for the State. It was a matter for the legislature, and not for this court to determine. The act has been adopted, as aforesaid, and we find no legal reason why it should not be held valid as written, in so far as it is questioned in this case. Appellant's contention, therefore, that public utilities owned and operated by municipalities are subject to the same regulation and rates under the Public Utilities act as those owned and operated by private corporations, and that it should be granted an injunction on the grounds contended for by it, can not be sustained.

The decree of the circuit court is affirmed.

Decree affirmed.

92 DUNN, C. J., CARTWRIGHT and FARMER, J.J., dissenting:

In operating an electric light plant and selling electricity to individuals the city is not exercising its governmental powers but its private proprietary rights, and its duties and liabilities are the same as those imposed by law upon individuals engaged in the same business. It was so held in regard to the furnishing of water and gas in Wagner v. City of Rock Island, 146 Ill. 139, where we said (p. 154): "A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation and not in the exercise of its powers of local sover-ignty. If this power is granted to a borough or city it is a special private franchise, made as well for the private emolument and advantage of the city as for public good. In separating the two powers, public and private, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively they belong to the corporate body in its public, political or municipal character; but if the grant was for purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quo ad hoc is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." (City of Chicago v. Selz, Schwab & Co. 202 Ill. 545; Village of Palestine v. Siler, 225 id. 630.) In Butler v. Karb, 96 Ohio St. 472, it is said: "That neither public nor private corporations may discriminate between members of the public with reference to rates and terms of service does not longer admit of controversy. This wholesome rule, long in force, has had frequent application, particularly to common carriers and utilities companies. A municipality operating a utility is not exempt therefrom. Acting in a

roprietary capacity, we have seen, it should have the freedom of
ction of a private utility corporation, but it is also subject to the
me restrictions as to practices of discrimination in rates and serv-
ice." So far as a municipality is engaged in the commercial
3 distribution of electricity, its rights and liabilities, powers
and duties are measured by the same standard and governed
y the same rules as apply to private corporations similarly engaged.
There is no doubt that the exception of municipalities owning or
perating public utilities from the operation of the public utilities
ct, which applies to every other corporation, company, association
r individual, grants to such corporations a special privilege which
uch other corporations do not enjoy, and is therefore obnoxious to
he provision of the State constitution against special laws unless
here exists some reasonable basis, having reference to the object of
he legislation, for placing such municipalities in a class by them-
elves. The constitutional provision does not mean that the same
ule shall apply to every individual in the state under all circum-
tances but only under substantially the same circumstances, and
aws may be valid though operating only upon particular persons
r classes of persons if there is a valid reason for such particular
peration. An arbit-ary designation of persons is not permissible.
The only reason which is recognized as valid is a substantial dis-
inction which differentiates in important particulars, having some
easonable and just relation to the purpose of the law, the particular
persons to whom it applies from all other persons. People v. Kewa-
nee Light Co., 262 Ill. 255.

A municipal corporation has no authority either to sell electricity
o private consumers or to fix the rate at which it shall be sold
within the municipality in the absence of a statute enabling it to
lo so. In June, 1913, the General Assembly passed and the Gov-
ernor approved a law which went into effect on July 1 and gave to
any city in the State the power to acquire, construct, own and operate
any public utility the product or service of which, or a major por-
tion thereof, is or is to be supplied to the city or its inhabitants, and
to contract for, purchase and sell to private persons or corporations
the products or service of such utilities and to fix the rates and
charges for the services rendered by such public utilities. (Laws of
1913, p. 455.) This statute does not confer authority for the regu-
lation of public utilities upon municipalities. At the same
94 session of the legislature another law was enacted which be-
came effective on January 1, 1914, and is known as the
Public Utilities act. (Laws of 1913, p. 459.) This act created a
Public Utilities Commission, to which it gave the general super-
vision of all public utilities and upon which extensive powers and
regulations were conferred. Among many other things every pub-
lic utility was prohibited from undertaking to perform any service
or furnish any product or commodity unless or until the rates and
other charges and classifications, rules and regulations relating
thereto, applicable to such service, product or commodity, have
been filed and published in accordance with the provisions of the
act. Such rates, charges or classifications, or any rule, regulation,

practice or contract relating to or affecting any rate or other charge, classification or service, cannot be changed, unless the commission otherwise orders, except after thirty days' notice to the commission and to the public; no increase in any rate or charge can be made except upon a showing before the commission and a finding by it that such increase is justified, and no greater or less rate can be charged for any product or service than that specified in the schedule at the time filed and in effect. Section 10 contained the clause which has been referred to, defining the term "public utility" and excepting utilities owned by municipalities from the definition. There is no doubt that the legislature intended that public utilities owned or operated by municipalities should not be under the supervision of the Public Utilities Commission or subject to its authority. There is no reason to suppose that this exemption was limited only to the operation of the utility in furnishing its product and service for the use of the municipality and did not extend to the entire operation. On the contrary, there was no occasion to except an electric light plant, for instance, which a city operated only for lighting the streets and public places and property and which had no private consumers. There was no need of all the detailed requirements of the Public Utilities act in the case of a municipality which is the only consumer of the product of its plant. The
95 exception applies to utilities owned by municipalities and operated commercially.

The purpose of the Public Utilities act was the prevention of extor-i-nate charges and unjust discriminations by public utilities. The authority to regulate public utilities is vested in the legislature, which may exercise it directly or through such governmental agencies as it may deem best. It might have given to each city in the State the power to regulate the rates to be charge- by public utilities for their services, respectively, within the municipality. It did not do this but it enacted a law authorizing each city to enter upon the commercial business of operating public utilities and to fix its own rates, and it is not contended that this was beyond the legislative power. The Public Utilities act, though/ passed at the same session, did not go into effect until six months later, and if there is any inconsistency between the*a* the later act must prevail. This act placed all public utilities under the supervision of the commission, and if the exception of utilities owned and operated by a municipality cannot be given effect the acts are inconsistent. The one gives the Public Utilities Commission supervision of the business of public utilities and control of rates, while the other gives the municipality the entire supervision and control of the business of any public utility it may own and the regulation of its rates and charges. The effect of the two statutes is that public utilities engaged in commercial operation are di/vided into two classes,—that is, those owned by a municipality and all others. The former have the privilege of operation without restriction or supervision by the State; the latter have not but must operate under the supervision and control of the Public Utilities Commission. Is the difference of ownership a reasonable basis, having reference to the purpose of

he legislation, for the difference in privilege? So far as this ques-ion is concerned there is no difference in the character or purpose f the business transacted. No municipal, political or governmental question is involved.

The appellant and the appellee each owns and operates an electric plant and sells electricity for the purpose of profit o all persons who want to buy it. What relation has the ownership f their respective plants to the questions of unjust discrimination, xtortionate charges and unequal or inferior service, which the Pub-ic Utilities act was intended to prevent? The consumers of the ppellant's product may be the same persons as the consumers of the ppelle-'s product, or neighbors side by side. They may be re-uired to pay extorti-nate rates or different rates for the same ser-ice, or if they pay the same rates the service may be inferior. The ppellant's customer has a remedy. He may apply to the Public Utilities Commission for relief, and if the facts justify it he is en-itled to relief as a legal right. The appellee's customer has no emedy. He can apply only to appellee,—the very authority of whose action complaint is made. In the one case the controversy s submitted to a third party; in the other to one of the parties to the ontroversy. The appellee's claim with reference to this classifica-ion is contained in the following extract from its brief: "The legis-lature has adopted its own classification of public utilities by au-horizing the municipalities to regulate and control municipal pub-ic utilities and the State commission to regulate and control pri-ately owned public utilities. This is a reasonable classification, ased upon the different conditions arising under municipal and rivate ownership and operation. In the operation of a municipal ublic utility the public officials are conducting the business for the eople themselves, who are in a position to obtain such rates and egulations as may be reasonably required. On the other hand, rivately owned utilities can only be controlled by an independent ody, such as a State commission or other agency."

The persons who use the products or service of public utilities are ntitled to the benefit of the Public Utilities act, and are entitled to ts protection against extortion, discrimination and inferior service, y whomso-ver furnished. The furnishing of such service is an ordinary commercial business by whomso-ver undertaken.

Whether a public utility is owned by a private corporation or a municipal corporation, its relation to its customers is not different. They are under the same compulsion to use its service, are at its mercy to the same extent. If a customer is oppressed by extortionate charges or discriminated against by a wrongful rate or inferior service, the wrong is the same whether done by a municipal corporation or a private corporation. The difference in ownership does not change the character of the wrong done or justify the refusal of a prompt, adequate and complete remedy in one case which is granted in the other. The fact that by organizing with others complaining customers may be able at some future election to secure a change of administration which will perhaps have the ability and sense of justice, voluntarily to correct the wrong does

not justify putting municipally owned public util-ties in a class separate from other competing public utilities and relieving them from the supervision of the Public Utilities Commission.

The clause which excepts municipally owned or operated public utilities from the definition of a public utility in section 10 of the Public Utilities act is unconstitutional. Section 83 of the act provides that "if any section, subdivision, sentence or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act." The act can be effectively carried out after eliminating the unconstitutional clause, and it is not necessary to declare the whole act unconstitutional. If some of the provisions of an act of the General Assembly are within the legislative power and others are beyond the legislative power, the former provisions may be held valid while the latter must be held invalid. Section 83 is not a mere declaration of a common law rule but is a declaration of the legislative intention. It expresses the intention that the legislature purpose to establish a commission and give it authority for the regulation of public utilities shall not be defeated by the unconstitutionality of any section, subdivision, or clause of the act.

98 This general purpose of the act must be carried out though parts of it may be declared unconstitutional. The inclusion of municipal plants within the authority of the commission does not destroy the general legislative scheme. It merely modifies it in detail. The General Assembly might have created the commission without exempting municipal corporations. Though it intended to exempt municipal corporations it had the power to provide that if such exemption were invalid, the act should still be valid without the exemption. This — the meaning of the declaration in section 83 and it is not the province of the court to say that the legislature did not mean what the words say, or did not know what they meant. In our judgment the decree of the circuit court should be reversed.

99 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Third day of February, in the year of our Lord One Thousand Nine Hundred and Twenty, within and for the State of Illinois.

Present:

Chief Justice Frank K. Dunn.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered, that, to-wit: on the 18th day of February, A. D. 1920, the same being one of the days of the said February term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

February 18th, A. D. 1920.

No. 12502.

SPRINGFIELD GAS & ELECTRIC COMPANY, Appellant,

vs.

THE CITY OF SPRINGFIELD, Appellee.

Appeal from Circuit Court of Sangamon County.

Error to —.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition

of the Judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error:

Therefore, it is considered by the Court that the Judgment of the Circuit Court aforesaid be affirmed in all things, and stand in full force and *affect*, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs, by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

——— ———.

———.

100 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the Sixth day of April, in the year of our Lord One Thousand Nine Hundred and Twenty, within and for the State of Illinois.

Present:

Frank K. Dunn, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice Clyde E. Stone.
Justice William M. Farmer.
Justice Warren W. Duncan.
Justice Floyd E. Thompson.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL,
Clerk.

Be it remembered, that to-wit, on the 13th day of April, A. D. 1920, the same being one of the days of the said April term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 12502.

SPRINGFIELD GAS & ELECTRIC COMPANY, Appellant,

vs.

CITY OF SPRINGFIELD, Appellee.

Appeal Circuit Court, Sangamon.

Now on this day the Court having duly considered the petition for hearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing this cause.

01 *Authentication of Record.*

UPREME COURT, STATE OF ILLINOIS, *ss:*

I, Charles W. Vail, Clerk of said Court, Do Hereby Certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of: Springfield Gas & Electric Company, plaintiff in Error, vs. City of Springfield, Defendant in Error, and also of the Opinions of the Court rendered therein, as the same now appear of record in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Supreme Court, at Springfield, in said State, this 3rd day of May, A. D. 1920.

[Seal of the Supreme Court, State of Illinois, Aug. 26, 1818.]

CHARLES W. VAIL,
Clerk Supreme Court of Illinois.

02 Be it remembered, to-wit, that on the 22nd day of April, A. D. 1920, there was filed in the office of the Clerk of the Supreme Court of Illinois by Springfield Gas & Electric Company, plaintiff in error, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. Frank K. Dunn, Chief Justice of the Supreme Court of Illinois, with the original order by the said Chief Justice allowing said writ of error, which original order is attached and incorporated herein and which documents are in words and figures as follows, to-wit:

103 In the Supreme Court of Illinois.

No. 12502.

SPRINGFIELD GAS AND ELECTRIC COMPANY, Plaintiff in Error,

vs.

CITY OF SPRINGFIELD, Defendant in Error.

Error from the Supreme Court of the United States to the Supreme Court of Illinois.

Petition for Writ of Error.

Now comes Springfield Gas and Electric Company, Plaintiff in error, and says that in the February Term, 1920, this Court entered judgment herein in favor of the City of Springfield, and against the Springfield Gas and Electric Company; that the Court in this April Term, 1920, denied the Petition of Plaintiff in error, for rehearing in said cause; that in said judgment certain errors were committed to the prejudice of said Springfield Gas and Electric Company, plaintiff in error, as appears from the record and proceedings and assignments of error filed with this Petition.

Wherefore, the Springfield Gas and Electric Company, Plaintiff in error, prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

W. L. PATTON,
PHILIP BARTON WARREN,
Solicitors for Springfield Gas and Electric Company, Plaintiff in Error.

Writ of Error granted this 22nd day of April, 1920.

FRANK K. DUNN,
Chief Justice of the Supreme Court of Illinois.

[Stamped:] Filed Apr. 22, '20. Chas. W. Vail, Clerk Supreme Court.

103½ [Endorsed:] In the Supreme Court of Illinois. Springfield Gas and Electric Company, Plaintiff in Error, vs. City of Springfield, Defendant in Error. No. 12502. Error from the Supreme Court of the United States to the Supreme Court of Illinois. Petition for Writ of Error. Philip Barton Warren, Springfield, Illinois.

104 In the Supreme Court of Illinois.

No. 12502.

SPRINGFIELD GAS AND ELECTRIC COMPANY, Plaintiff in Error,

vs.

CITY OF SPRINGFIELD, Defendant in Error.

Error from the Supreme Court of the United States to the Supreme Court of Illinois.

[Stamped:] Filed Apr. 22, '20. Chas. W. Vail, Clerk Supreme Court.

Assignment of Error by Springfield Gas and Electric Company, Plaintiff in Error.

The Springfield Gas and Electric Company, Plaintiff in error, files herewith, its Petition for a Writ of Error, and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

(1) The Supreme Court of Illinois erred in not reversing the decree of the Circuit Court of Sangamon county, Illinois, entered in the above entitled cause while pending in said Circuit Court.

(2) The Supreme Court of Illinois erred in denying the Petition of Springfield Gas and Electric Company, Plaintiff in error, for a rehearing.

(3) The Supreme Court of Illinois erred in holding that the exception of "such public utilities as are or may hereafter be owned or operated by any municipality" contained in Section 10 of the Act of the General Assembly of the State of Illinois, entitled: "An Act to provide for the regulation of Public Utilities," approved June 30th, 1913, in force Jan. 1, 1914, from the general operation of said Act is constitutional and valid.

(4) The Supreme Court of Illinois erred in not holding that said exception is unconstitutional and invalid as being in viola-
105 tion of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of Illinois erred in not holding, finding and decreeing that public utilities owned or operated by any municipality of the State of Illinois, the product of which is sold to private consumers, for hire or charge, are, in such capacity, subject to all of the terms and provisions of an Act of the General Assembly of the State of Illinois, entitled: "An Act to provide for the Regulation of Public Utilities," approved June 30th, 1913, in force, January 1, 1914, and in not holding, finding and decreeing that the

attempted exemption thereof in said Act is unconstitutional and void as being in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, for the reasons above set forth, and which the record will sustain, the Springfield Gas and Electric Company, Plaintiff in error, prays that said judgment of the Supreme Court of Illinois be reversed.

W. L. PATTON,
PHILIP BARTON WARREN,
Solicitors for Springfield Gas and Electric Company, Plaintiff in Error.

105½ [Endorsed:] In the Supreme Court of Illinois. Springfield Gas and Electric Company, Plaintiff in Error, vs. City of Springfield, Defendant in Error. No. 12502. Error from the Supreme Court of the United States to the Supreme Court of Illinois. Assignment of Error. Philip Barton Warren, Springfield, Illinois.

106 In the Supreme Court of Illinois.

No. 12502.

SPRINGFIELD GAS AND ELECTRIC COMPANY, Plaintiff in Error,

vs.

CITY OF SPRINGFIELD, Defendant in Error.

Error from the Supreme Court of the United States to the Supreme Court of Illinois.

Order Allowing Writ of Error.

This 22nd day of April, 1920, came the Springfield Gas and Electric Company, Plaintiff in error, by its solicitors, and filed herein and presented its Petition "for allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of Illinois, and also filed and presented therewith assignments of error, intended to be urged by it, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was entered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, the Court does allow the Writ of Error, which operates as a supersedeas, upon the Springfield Gas and Electric Company, plaintiff in error, giving bond in the sum of Two ($2,000.00) Thousand dollars.

FRANK K. DUNN,
Chief Justice of the Supreme Court of Illinois.

[Stamped:] Filed Apr. 22, '20. Chas. W. Vail, Clerk Supreme Court.

106½ [Endorsed:] In the Supreme Court of Illinois. Springfield Gas and Electric Company, Plaintiff in Error, vs. City of Springfield, Defendant in Error. No. 12502. Error from the Supreme Court of the United States to the Supreme Court of Illinois. Order Allowing Writ of Error. Philip Barton Warren, Springfield, Illinois.

107 Be it remembered, that on the 22nd day of April, A. D. 1920, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Springfield Gas & Electric Company, plaintiff in error, an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, a copy of which Bond is in the words and figures following, to-wit:

108 *Bond.*

Copy.

Know all men by these presents: That we, the Springfield Gas and electric Company, as Principal, and the American Surety Company of New York, as Surety, are held and firmly bound unto the City of Springfield, a municipality of the State of Illinois, in the sum of Two ($2,000.00) Thousand Dollars to be paid to the said City, to which payment, well and truly to be made we bind ourselves, our successors and assigns jointly and severally, firmly by These Presents.

Sealed with our Seals and dated this 22 day of April, 1920.

Whereas, the above named Springfield Gas and Electric Company, Plaintiff in Error, seeks to prosecute its Writ of Error to the Supreme Court of the United States, to reverse the judgment of the Supreme Court of Illinois, rendered in the above entitled cause;

Now, therefore, the condition of this obligation is such that if the above named, Springfield Gas and Electric Company, Plaintiff in error, shall prosecute its said Writ of Error with effect, and shall answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

SPRINGFIELD GAS AND ELECTRIC COMPANY,
By A. D. MACKIE,
Vice President.

Attest:
H. J. BRUNNENMEYER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
By W. C. KIKENDALL,
Resident Vice President.

Attest:
P. B. WARREN,
Resident Ass't Sec'y.

Bond approved and to operate as a supersedeas.

FRANK K. DUNN,
Chief Justice of the Supreme Court of Illinois.

[Stamped:] Filed Apr. 22, '20. Chas. W. Vail, Clerk Supreme Court.

108½ [Endorsed:] In the Supreme Court of Illinois. Springfield Gas and Electric Company, Plaintiff in Error vs. City of Springfield, Defendant in Error. No. 12502. Error from the Supreme Court of the United States to the Supreme Court of Illinois. Bond on Writ of Error. Philip Barton Warren, Springfield, Illinois.

109 Be it also remembered, that on the 22nd day of April, A. D. 1920, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error which is hereby attached and is in words and figures as follows, to-wit:

110 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between Springfield Gas and Electric Company and City of Springfield, wherein was drawn in question the validity of a treaty or Statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a Statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or Statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, Statute, or Commission; a manifest error hath happened, to the great damage of the said Springfield Gas and Electric Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if Judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington,

thin thirty days from the date hereof, that the record and pro-dings aforesaid being inspected, the said Supreme Court may use further to be done therein to correct that error, what of right, d according to the laws and customs of the United States, should done.

[Stamped:] Filed Apr. 22, '20. Chas. W. Vail, Clerk Supreme urt.

1 Witness the Honorable Edward D. White, Chief Justice of the United States, the 22nd day of April in the year of our rd one thousand nine hundred and twenty.

[Seal of the District Court United States, Southern District Illinois.]

W. C. KROUEG,
Clerk District Court United States,
Southern District of Illinois.

Allowed April 22nd, 1920, by
FRANK K. DUNN,
Chief Justice Illinois Supreme Court.

[Stamped:] Filed Apr. 22, '20. Chas. W. Vail, Clerk Supreme urt.

12 *Certificate of Lodyment.*

UPREME COURT, STATE OF ILLINOIS, *ss:*

I, Charles W. Vail, Clerk of the Supreme Court, Do Hereby Cer-fy that there was lodged with me as such Clerk on the 22nd day April, A. D. 1920, in the matter of: Springfield Gas & Electric ompany, Plaintiff in Error, vs. City of Springfield, Defendant in rror,

1. The original bond of which a copy is herein set forth.

2. A copy of said writ of error to file in my office and a copy of id writ of error for the defendant in error.

In Testimony Whereof, I have hereunto set my hand and affixed he seal of the said Supreme Court, at Springfield, Illinois, this 3rd ay of May, A. D. 1920.

[Seal of the Supreme Court, State of Illinois, Aug. 26, 1818.]

CHARLES W. VAIL,
Clerk of the Supreme Court.

13 And afterwards, to-wit, on the 23rd day of April, A. D. 1920, a certain Citation showing service on City of Spring-eld, defendant in error, was filed in the office of the Clerk of the upreme Court, in the words and figures following, to-wit:

114 In the Supreme Court of Illinois.

No. 12502.

SPRINGFIELD GAS AND ELECTRIC COMPANY, Plaintiff in Error,

vs.

CITY OF SPRINGFIELD, Defendant in Error.

Error from the Supreme Court of the United States to the Supreme Court of Illinois.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Springfield, a Municipality of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to a Writ of Error, filed in the office of the Clerk of the Supreme Court of the State of Illinois, wherein the Springfield Gas and Electric Company, — Plaintiff in Error, and you, the City of Springfield, are Defendant in error, to show cause, if any there be, why the judgment rendered against the Springfield Gas and Electric Company, Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness, the Honorable Frank K. Dunn, Chief Justice of the Supreme Court of the State of Illinois, this 22nd day of April, 1920.

FRANK K. DUNN,
Chief Justice of the Supreme Court of the State of Illinois.

Service of the within citation accepted this 22 day of April, 1920.

B. L. CATRON,
A. D. STEVENS,
Solicitors for the City of Springfield, a Municipality of the State of Illinois.

[Stamped:] Filed Apr. 23, '20. Chas. W. Vail, Clerk Supreme Court.

114½ [Endorsed:] In the Supreme Court of Illinois. Springfield Gas and Electric Company, Plaintiff in Error, vs. City of Springfield, Defendant in Error. No. 12502. Error from the Supreme Court of the United States to the Supreme Court of Illinois. Citation on Writ of Error. Philip Barton Warren, Springfield, Illinois.

15 In the Supreme Court of Illinois.

No. 12502.

SPRINGFIELD GAS AND ELECTRIC COMPANY, Plaintiff in Error,

vs.

CITY OF SPRINGFIELD, Defendant in Error.

rror from the Supreme Court of the United States to the Supreme Court of Illinois.

Præcipe for Record.

The Clerk of the Supreme Court of Illinois, will please furnish complete transcript of the record in the above entitled cause, to be led in the Supreme Court of the United States on error to the Supreme Court of Illinois.

Dated this 22nd day of April, 1920.

W. L. PATTON,
PHILIP BARTON WARREN,
Solicitors for Springfield Gas and Electric Company, Plaintiff in Error.

To: Mr. Charles W. Vail, Clerk of the Supreme Court of Illinois.

[Stamped:] Filed Apr. 22, '20. Chas. W. Vail, Clerk Supreme ourt.

15½ [Endorsed:] In the Supreme Court of Illinois. Springfield Gas and Electric Company, Plaintiff in Error, vs. City f Springfield, Defendant in Error. No. 12502. Error from the upreme Court of the United States to the Supreme Court of Illinois. ræcipe for Record. Philip Barton Warren, Springfield, Illinois.

16 *Return to Writ.*

NITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same, in accordance with Præcipe hereto annexed.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at Springfield, in said State, this 3rd day of May, A. D. 1920.

[Seal of the Supreme Court, State of Illinois, Aug. 26, 1818.]

CHARLES W. VAIL,
Clerk Supreme Court of Illinois.

Endorsed on cover: File No. 27,666. Illinois Supreme Court. Term No. 327. Springfield Gas and Electric Company, plaintiff in error, vs. City of Springfield. Filed May 8th, 1920. File No. 27,666.

Office Supreme Court, U. S.
FILED
MAR 3 1921
JAMES D. MAHER,
CLERK

No. [redacted]46

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, A. D. 1920

SPRINGFIELD GAS AND ELECTRIC COMPANY,
Plaintiff in Error.
vs.
CITY OF SPRINGFIELD.

In Error to the Supreme Court of the State of Illinois.

BRIEF OF SPRINGFIELD GAS AND ELECTRIC COMPANY
Plaintiff in Error

PHILIP BARTON WARREN,
WILLIAM L. PATTON,
JOSEPH S. CLARK,
Solicitors for Plaintiff in Error.

SUPREME PRINTING CO. SPRINGFIELD, ILLINOIS

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Sabre vs. Brooklyn R. R. Co., 85 *Atl.*, 693 30

Tarantina vs. R. R. Co., 254 *Ill.*, 624 154

Tulsa Co. vs. Okla. Co., 27 *Okla.*, 339 14

Torrent vs. Muskeegon, 47 *Mich.*, 115 ..... 20, 27, 86

Vilas vs. Manila, 220 *U. S.*, 345 ..... 15, 19, 33

Vicksburg vs. Vicksburg Waterworks, 206 *U. S.*, 496 ..... 15, 19

Walla Walla vs. Water Co., 172 *U. S.*, 1, 8, 10, 19 .... 16, 19

Wigal vs. Parkersburg (*W. Va.*), 52 *L. R. A.* (*n. s.*), 464; 5 *L. R. A.* (*n. s.*), 536; 43 *L. R. A.* (*n. s.*), 862; 52 *L. R. A.* (*n. s.*), 464 ..... 18, 105

Wagner vs. City of Rock Island, 146 *Ill.*, 139 *at* 156 .. .. 16, 18, 27, 41, 43, 82, 83

Winona vs. Batzet, 169 *Fed.*, 321 21

Witter vs. County Comrs., 256 *Ill.*, 616 138

West Savings Co. vs. Phila., 31 *Pa.*, 175 21

Wood vs. Phila., 46 *Pa. Sup. Ct.*, 573 ..... 28, 140

Wyman on Public Ser. Corps., at Sec. 861 119

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, A. D. 1920

SPRINGFIELD GAS AND ELECTRIC COMPANY, *Plaintiff in Error.* vs. CITY OF SPRINGFIELD.	In Error to the Supreme Court of the State of Illinois.

STATEMENT OF THE CASE.

Prior to July 1, 1913, Illinois municipalities had no power to generate and sell electricity for private consumpton. On the 19th of June, 1913, the Illinois legislature passed the Municipal Ownership Act authorizing cities "to acquire, construct, own and operate any public utility, the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants, and to contract for, furnish and sell to private persons or corporations the products or service

of such utilities," and to "fix the rates and charges for the service rendered" and "to make all needful rules and regulations in relation thereto." (Appendix p. 64.) This act was approved June 26, 1913, and became effective July 1, 1913.

Prior to July 1, 1913, there was no statute providing for governmental regulation of public utilities. On the 20th day of June, 1913, the Illinois legislature passed the Public Utilities Act, creating a state commission having jurisdiction over all public utilities except those operated by cities, and providing for comprehensive, mandatory, governmental regulation of utilities. This act was approved June 26, 1913, and became effective January 1, 1914. (Appendix p. 7).

For many years prior to January 1, 1914, plaintiff, a private corporation of Illinois, had been and is now, engaged in the production and sale of electricity to private consumers in and about the City of Springfield, Illinois, and after the Utilities Act went into effect, it complied and is now complying with all of the provisions of that act. Subsequent to January 1, 1914, purporting to act under the power granted by the Municipal Ownership Act, the defendant, City of Springfield, began to, and is now engaged in the generation and sale of electricity to private consumers in and about the City of Springfield, but without complying with the provisions of the Utilities Act.

On December 18, 1915, plaintiff in error filed its bill in equity in the Circuit Court of Sangamon County, Illinois, against the City of Springfield and its officers, which as finally amended, alleged (Trans. p. 7 et seq.): (a) that plaintiff is a corporation of Illinois, engaged in the production, distribution and sale of electricity for light, heat and power within the City of Springfield and the adjacent portions of Sangamon County by virtue of ordinance contracts with said city, entered into prior to June 30, 1913; (b) that it is a public utility subject to, and that it had fully complied with, all of the provisions of Illinois statute entitled "An Act to provide for the Regulation of Public Utilities," approved June 30, 1913, in force January 1, 1914, (hereinafter referred to as Utilities Act), and particularly Sections 33 and 34 of the statute as to filing, publishing and procuring the approval of the State Commission of its schedule of rates; (c) that the defendant City of Springfield is a municipal corporation, organized and existing under the laws of Illinois; that subsequent to January 1, 1914, and thence hitherto, the defendant city has been and is now producing, distributing and selling electricity for light, heat and power for the use of and to private consumers for hire or charge within the territorial limits of said city and adjacent portions of the county, and thereby is a "*public utility*" within the meaning of that term as used in the Utilities Act; (d) that the defendant city claims it is exempt, in so operating its said electric plant

and selling the product thereof to private consumers, from the provisions of the Utilities Act by reason of the pretended exceptions in Section 10 of said act; (e) that said pretended exceptions do not exempt municipal corporations operating electric plants for the sale of the product to private consumers, but only exempt that portion of such plants as is used for purely city purposes; (f) that if said pretended exceptions contained in Section 10 of said act do have the effect of attempting to exempt municipal corporations in their operation of electric plants for the sale of electricity to private consumers, such exemptions are wholly invalid in violation of Section 22 of Article IV of the Illinois Constitution and of the XIV Amendment to the Federal Constitution; (g) that the defendant city has never complied with the provision of said act as to filing, publishing and procuring the approval of the state commission of its schedule of rates for service to private consumers, and is producing and selling electricity to private consumers in violation of said act; (h) that in so producing and selling electricity to private consumers the defendant city is engaged in and carrying on the same kind of a commercial enterprise as plaintiff is, and therein and thereby competing with plaintiff for such commercial business in the same territory; (i) that defendant city is now, and for some time past has been, soliciting plaintiff's patrons to cease purchasing electricity from plaintiff at rates filed and approved by the state commission, and to purchase elec-

tricity from said city at rates not filed or approved by said commission in compliance with the Utilities Act; (j) that many of plaintiff's patrons have ceased buying electricity from it and have become patrons of said city, therein causing plaintiff great and irreparable loss; (k) that unless the city is restrained it will continue to deprive plaintiff of many other patrons and continue to produce and sell electricity to private consumers at rates not filed and approved by said state commission, and in violation of the Utilities Act; (l) that the defendant city is threatening to continue said unlawful practices and will do so unless restrained.

The bill of complaint then prays that the defendant city be enjoined from operating in whole or in part any electric plant for the production or sale of electricity to private consumers without having first filed schedules of rates of charges to private consumers and printed and posted the same as prescribed by Sections 33 and 34 of the Utilities Act; and that plaintiff have such further and other relief as the nature of the case shall require.

The answer of the defendant city avers (Trans. p. 12 et seq.): (a) ignorance of plaintiff's charter and ordinance powers and its compliance with the Utilities Act, but prays strict proof; (b) that it is a municipal corporation; (c) that the Illinois statute entitled: "An Act to authorize cities to acquire, construct, own and lease or operate public utilities and to provide the means there-

for'' was passed June 26, 1913, and became effective July 1, 1913; (d) that the Utilities Act was passed June 30, 1913, and became effective January 1, 1914; (e) that for many years prior to July 1, 1913, it owned and operated an electric plant located in said city for its own use, and sold its excess product to private consumers; (f) that prior to July 1, 1913, it owned and operated an electric generator for pumping water, and sold the excess current there generated to private consumers; (g) that during the year 1915, it installed an additional electric generator at its water pumping plant and at said place now has a combined electric and water pumping plant; (h) that such current as is now generated by said combined plant and not required for city purposes is sold to private consumers; (i) denies that its operation of said plant or the sale of electricity therefrom is in any way governed by the Utilities Act; (j) denies that it has never printed or kept open to public inspection its schedules of rates for electricity; (k) denies that it has violated any law of the state as to publishing or posting its schedule of rates; (l) denies that it is producing and selling electricity without complying with any law relative thereto; (m) avers ignorance of the kind of commercial enterprise carried on by plaintiff or whether it is the same kind carried on by defendant in selling electricity to private consumers, and prays strict proof thereof; (n) denies that it has been soliciting plaintiff's patrons; (o) avers that it is selling its surplus electricity at a reason-

able profit and has more applications for it than it can supply; (p) *avers that while it is selling at about one-half plaintiff's rates, it has at all times sold at a profit and during the year last past such profits aggregated many thousands dollars;* (q) denies that plaintiff's rates and charges have been filed with the state commission; (r) denies plaintiff is entitled to relief prayed; (s) and prays same advantage of its answer as though it had demurred to the bill of complaint.

To defendant's answer, plaintiff filed its exceptions for insufficiency and impertinence (Tran. pp. 18-21), alleging sixteen specific exceptions, and praying that the impertinent matter be expunged, and that the pretended answer be taken and treated by the court as raising only the legal question of the sufficiency of the bill, *i. e.*, as a demurrer thereto. The cause was set down, argued before the court, submitted and taken under advisement upon the bill, answer and exceptions (Trans. p. 23). The court took the cause in its entirety, exactly as if a demurrer had been filed to the bill and having duly considered the same *entered a decree dismissing the bill for want of equity with costs against plaintiff* (Trans. p. 24). From this decree plaintiff prosecuted an appeal to the Supreme Court of Illinois, where, on the 15th day of April, 1919, an order was entered reversing the decree of the Circuit Court and remanding the cause with directions to sustain the exceptions of plaintiff to defendant's answer (Trans. p. 37).

On the same day the Supreme Court rendered an opinion that the Tenth Section of the Utilities Act attempting to except a municipal plant from the operation of the act is unconstitutional and that the remainder of the act can be effectively carried out after eliminating the unconstitutional clause (Trans. pp. 31-36).

On the 4th of June, 1919, upon petition of defendant, the Supreme Court granted a rehearing (Trans. p. 38), and on February 18, 1920, by a four to three vote, affirmed the decree of the Circuit Court and delivered an opinion holding Section 10 of the Utilities Act constitutional (Trans. p. 40). At the same time the original opinion of the court, holding the section unconstitutional, was filed as the dissenting opinion of Justices Dunn, Cartwright and Farmer (Trans. p. 50).

On the 13th day of April, 1920, the Supreme Court considered and denied plaintiff's petition for a rehearing (Trans. p. 57). On the 22nd day of April, 1920, a writ of error to this court was granted (Trans. pp. 57-66).

In its first opinion the Illinois Supreme Court, speaking of the Municipal Ownership Act and the Utilities Act, said the effect of the two statutes was to divide public utilities engaged in commercial business into two classes —those owned by municipalities and all others; that the former have the privilege of operation without state regulation and the latter have not; that there is no difference in the character or purpose of the business trans-

acted; that the ownership of the plants has no relation to unjust discrimination, extortionate charges and unequal or inferior service which the Utilities Act was intended to prevent; that the patron of one plant is as much entitled to protection as the patron of the other; that if the municipality is exempted from the Utilities Act its patrons have no remedy, while those of all other plants have; that the exemption of municipalities is obnoxious to the State Constitution against special laws; and that the elimination of the unconstitutional provisions does not render the whole act void (Trans. pp. 31-36).

In its second opinion reversing the above position, by a vote of four to three, the Illinois court holds: that the Municipal Ownership Act is complete within itself, authorizing cities to own, operate and regulate utilities owned by them, and furnishes the reason for exempting such plants from the Utilities Act; that the patrons of the municipal plant are as well protected against unreasonable rates, discrimination and inferior service by the regulation provided by the Municipal Ownership Act as are patrons of other plants under the regulation provided by the Utilities Act; that the difference between the two plants which justifies such a classification is that the municipal plant is not permitted to profit to "the same extent" as the plant owned by other corporations; that the exemption is not unconstitutional; and that if it was the whole Utilities Act must be declared void since that

act without the exemption would result in a law not contemplated or desired by the legislature. (Trans. pp. 40-50).

The final judgment of the lower court has its basis in two propositions, *viz*: (1) that by a valid act (M. O. Act) the patrons of the municipal plant are furnished as adequate protection as the patrons of privately owned plants, and the municipal plant is subjected to the same kind of governmental regulation as all other plants; and (2) that the municipality can not profit to the "same extent" as other corporations and such difference constitutes that real and substantial distinction necessary to justify the classification.

It is thus seen that the ultimate question presented in this record is whether the City of Springfield, in carrying on the business of producing and selling electricity to private consumers, as a commercial enterprise in competition with the plaintiff engaged in the same kind of business, is subject to the same kind of comprehensive mandatory, governmental regulation of public utilities as plaintiff is, *i. e.*, that provided by the Utilities Act.

Plaintiff contends that when a city engages in a business enterprise, it is exercising its proprietary and not its governmental functions, and must be "regarded *quo ad hoc* a private corporation," with the attendant characteristics and obligations, and that the attempted exemption of municipalities, engaged in the same commercial enter-

prise, from the regulation of the Utilities Act while retaining for regulation the plants of all other private corporations, is an unjustifiable classification and void, in violation of the State and Federal constitutions. Our contention is based on the indisputable fact that since a municipality can only do a commercial utility business in its character of private corporation, there can be, *in its rights and duties as to such business*, no distinction between it and any other private corporation doing the same business; and likewise there can be no distinction between the rights of the patrons of the municipal plant and of the plant of any other corporation doing the same business.

We further contend that the Municipal Ownership Act does not provide the same kind of *governmental* regulation for municipal plants as the Utilities Act does for all other plants; that the Municipal Ownership Act is not a valid act and therefore cannot furnish as adequate protection to the patrons of municipal plants as is furnished to patrons of all other plants by the Utilities Act.

As this case involves the construction of these two acts, we have set them out in full as an appendix to this brief.

ERRORS RELIED UPON.

(1) The Supreme Court of Illinois erred in not reversing the decree of the Circuit Court of Sangamon

County, Illinois, entered in the above entitled cause while pending in said Circuit Court.

(2) The Supreme Court of Illinois erred in denying the Petition of Springfield Gas and Electric Company, plaintiff in error, for a rehearing.

(3) The Supreme Court of Illinois erred in holding that the exception of "such public utilities as are or may hereafter be owned or operated by any municipality" contained in Section 10 of the Act of the General Assembly of the State of Illinois, entitled: "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, in force January 1, 1914, from the general operation of said act is constitutional and valid.

(4) The Supreme Court of Illinois erred in not holding that said exception is unconstitutional and invalid as being in violation of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of Illinois erred in not holding, finding and decreeing that public utilities owned or operated by any municipality of the State of Illinois, the product of which is sold to private consumers, for hire or charge, are, in such capacity, subject to all of the terms and provisions of an Act of the General Assembly of the State of Illinois, entitled: "An Act to provide for the regulation of Public Utilities," approved June 30, 1913, in force January 1, 1914, and in not hold-

ng, finding and decreeing that the attempted exemption hereof in said act is unconstitutional and void, as being a violation of the Fourteenth Amendment to the Constitution of the United States. (Trans. p. 59).

BRIEF POINTS.

I.

One operating a public utility is entitled to an injunction against another operating, without authority, a similar utility which competes with and injures the former's business.

Memphis Ry. Co. vs. Rapid Transit Co., 133 *Tenn.* 99;

Millville Gas Co. vs. Vineland L. & P. Co., 72 *N. J. Eq.* 305;

Bartlesville E. L. & P. Co. vs. Bartlesville Ry. Co., 26 *Okla.* 457;

Ashley Tel. Co. vs. New Ashley Tel. Co., 92 *Ohio St.* 336;

Farmers Tel. Co. vs. Boswell Tel. Co. (*Indiana*), 119 *N. E. Rep.* 513;

Tulsa Co. vs. Oklahoma Co., 27 *Okla.* 339;

Lindsley vs. Dallas St. Ry. Co. (*Texas*), 200 *S. W. Rep.* 207;

Citizens Co. vs. L. & W. V. R. Co. (*Penn.*), 99 *Atl. Rep.* 465;

Springfield Gas Co. vs. Springfield, 292 *Ill.* 236.

II.

Originally, municipal corporations had but one function, that of government, in which it was a part of, and possessed the same immunities as, the sovereign.

People vs. Bergman, 253 *Ills.* 469, *at* 570;

Chicago vs. Union Co., 252 *Ills.* 311.

III.

In this primary status, (the governmental capacity) s the creature of the legislature, its powers may be dified or destroyed at the will of the legislature, and perty so held may be resumed by the state without lating any vested right.

Exparte Corliss, 114 *N. W.* 962, *at* 981;

Hunter vs. Pittsburgh, 207 *U. S.* 161, *at* 178; 28 *Cyc.* 298.

IV.

As the complexity of society increased, the primary ction, by the grace of the legislature, had added to it ny purely private functions, and the municipal cor- ation took on a dual status, the line between the gov- mental and private capacities being always clearly rked.

Dillon on Munc. Corp., 4th Ed., Vol. 1, *Sec.* 66;

Vilas vs. Manila, 220 *U. S.* 345;

Russell vs. Sebastian, 233 *U. S.* 195;

So. Car. vs. U. S., 199 *U. S.* 437;

New Orleans Gas Co. vs. Drainage Com., 197 *U. S.* 453;

Vicksburg vs. Vicksburg Waterworks, 206 *U. S.* 496;

Los Angeles vs. Los Angeles Gas Co., 251 *U. S.*, 31;

Oliver vs. Worcester, 102 *Mass.* 489;

Mayer vs. 2nd Ave. Ry., 32 *N. Y.* 261;

Walker vs. Rock Island, 146 *Ills.* 139;

Springfield vs. Springfield Gas Co., 292 *Ills.* 236, *at* 250.

V.

In the private or proprietary capacity it possesses none of the attributes of sovereignty, but accepts the grant of proprietary powers *as a distinct entity from its governmental individuality.*

State vs. Barker, 89 *N. W.* 204;

Los Angeles vs. Gas Co., 241 *Fed.* 912;

(*Affirmed, U. S. Sup. Ct. Adv. Op.*, 1919-20, *p.* 88).

VI.

A municipal corporation which supplies its inhabitants with electricity, gas or water, does so in its capacity, of a private corporation, and not in the exercise of its powers of local sovereignty.

Walla Walla vs. Water Co., 172 *U. S.* 1, 8, 10, 19;

Los Angeles vs. Gas Co., 251 *U. S.*, 31;

Safety Wire Co. vs. Baltimore, 66 *Fed.* 140, 143;

Walker vs. Rock Island, 146 *Ills.* 139;

Springfield vs. Springfield Gas Co., 292 *Ills.* 236, *at* 250;

State Journal vs. Madison, (*Wis.*), 134 *N. W.* 909, *at* 912;

Karpenski vs. So. River, (*N. J.*), 83 *Atl.* 639, *at* 641;

Hodgins vs. Bay City, (*Mich.*), 121 *N. W.* 275;

Henry vs. Lincoln, (*Neb.*), 140 *N. W.* 665, *at* 666;

People vs. Brewing Co., 261 *Ills.* 22.

VII.

In exercising its private functions a municipality is, rom every viewpoint and for every purpose, ("*quo ad oc*") a private corporation, with the characteristics, ghts and obligations of other private corporations (en- aged in the same kind of business), and none other.

(a) Negligence in operation:

Chicago vs. Selz Schwab, 202 *Ills.* 545;

Palestine vs. Siler, 225 *Ills.* 630, *at* 636;

Damman vs. St. Louis, 152 *Mo.* 186;

6 *McQuillan on Mun. Corp., Sec.* 2680;

4 *Dillon on Mun. Corp., Sec.* 1670;

Devaust vs. Alameda (*Cal.*), 5 *L. R. A.* (*N. S.*) 536;

Fisher vs. New Bern (*N. C.*), 5 *L. R. A.* (*N. S.*) 542;

Brantman vs. Canby (*Minn.*), 43 *L. R. A.* (*N. S.*) 862;

State Journal vs. Madison, 134 *N. W.* 909;

Hinze vs. Iola, 92 *Kan.* 779;

Gordon vs. Silver Creek, 197 *N. Y.* 509;

St. Germain vs. Fall River, 177 *Mass*;

Augusta vs. Mackey, 113 *Ga.* 64;

Wigal vs. Parkersburg (*W. Va.*), 52 *L. R. A.* (*N. S.*) 464.

(The cases are so numerous on this subject it is doubtful if a single state can be found in which this position has not been taken. Extended notes containing many cases will be found in 5 *L. R. A.* (*N. S.*) 536; 43 *L. R. A.* (*N. S.*) 862; 52 *L. R. A.* (*N. S.*) 464).

(b) Application of Women's Ten Hour Law to Municipal Hospital:

People vs. Chicago, 256 *Ills.* 558, *at* 562.

(c) Application of doctrine of estoppel:

Gregsten vs. Chicago, 145 *Ills.* 451;

People vs. Gas Co., 260 *Ills.* 392.

(d) That charges for utility service rendered by a municipality can not be imposed as a tax, as a city can only tax in its governmental capacity:

People vs. Schlitz, 261 *Ills.* 22, *at* 25.

(e) Is subject to same rules as to equality of service and reasonableness of rates as any other private corporation:

Wagner vs. City of Rock Island, 146 *Ills.* 139, *at* 156;

State vs. Waseca (*Min*), 142 *N. W.* 319, *at* 320;

Butler vs. Karb (*Ohio*), 117 *N. E.* 953, *at* 956;

Chicago vs. Ins. Co., 218 *Ills.* 40, *at* 43.

(f) In operating a public utility it may not exercise any power or right conferred upon it in its governmental capacity:

Los Angeles vs. Los Angeles, 241 *Fed.* 912;

(Affirmed 251 *U. S.*, 32.)

(g) Change of sovereignty does not affect utility property held by municipality in its private capacity as it does other property held in its governmental capacity:

Vilas vs. Manila, 220 *U. S.* 345, *at* 356.

(h) In respect to rights and property held in its private capacity it is entitled to the same constitutional protection as other private corporations:

New Orleans vs. Water Works, 142 *U. S.* 79, *at* 91;

Hunter vs. Pittsburgh, 207 *U. S.* 161.

(i) Contract by municipality in its private capacity as to a public utility can not be impaired by statute or constitutional amendment:

Russell vs. Sebastian, 233 *U. S.* 195;

Vicksburg vs. Water Co., 206 *U. S.* 496, *at* 508;

Los Angeles vs. Los Angeles, 177 *U. S.* 558;

Walla Walla vs. Water Co., 172 *U. S.* 1;

New Orleans vs. Rivers, 115 *U. S.* 674.

(j) Contract by municipality in its private capacity as to a public utility is controlled by the same rules that govern other private corporations, and binds its successive sets of officers:

Pikes Peak vs. Colorado, 105 *Fed.* 1, *at* 10;

Ills. Trust vs. Arkansas, 76 *Fed.* 271;

Safety Co. vs. Baltimore, 66 *Fed.* 140.

(k) In exercising governmental functions, clear authority must be found in the statutes, while in the management of a public utility its powers and responsibility are governed by rules applicable to other private corporations:

Audit Co. vs. Louisville, 185 *Fed.* 349, *at* 352;

Pond on Mun. Ownership, Secs. 8 *and* 11;

Andrews vs. South Haven, 187 *Mich.* 294;

Torrent vs. Muskegon, 47 *Mich.* 115;

Henderson vs. Young, 119 *Ky.* 224;

Oliver vs. Worcester, 102 *Mass.* 489, *at* 499.

(l) The agencies and instruments of a state in the exercise of its governmental functions are exempt from the taxing power of the Federal Government, but when a state takes over the liquor business, it does so as a private corporation, and is no more exempt:

So. Carolina vs. U. S., 199 *U. S.* 437, *at* 463.

(m) A statute requiring notice of claim to be served on a city before instituting suit has no application to a claim arising out of operation of a utility by a city:

Henry vs. Lincoln, 140 *N. W.* 665.

(n) Miscellaneous cases:

Litchfield vs. Litchfield Co., 95 *Ills. App.* 647, *at* 651;

Chicago vs. University, 131 *Ills. App.* 361, *at* 376;

Davis vs. Abs. Co., 121 *Ills. App.* 121, *at* 126-7;

Holmes vs. Chicago, 203 *Ills. App.* 445, *at* 448;

Richland vs. Lawrence, 12 *Ills.* 1, *at* 8;

In re: Rapid Transit Comrs., 197 *N. Y.* 81, *at* 96;

Higginson vs. Slattery (*Mass.*), 99 *N. E.* 523, *at* 524;

Bailey vs. New York, 3 *Hill*, 531, *at* 539;

Eaton vs. Weiser, 12 *Idaho*, 544;

Riley vs. Independence (*Mo.*), 167 *S. W.* 1022, *at* 1025;

Brown vs. Salt Lake, 33 *Utah* 222;

Piper vs. Madison (*Wis.*), 122 *N. W.* 730;

Winona vs. Batzet, 169 *Fed.* 321;

Hourigan vs. Norwich (*Conn.*), 59 *Atl.* 487;

Aschoff vs. Evansville (*Ind.*), 72 *N. E.* 279;

Barron vs. Detroit, 19 *L. R. A.* 452;

E-G Cigar Co. vs. Portland, 34 *Ore.* 282;

State vs. Barker (*Iowa*), 89 *N. W.* 204;

West Savings Co. vs. Phila., 31 *Pa.* 175.

VIII.

The patron of a public utility service furnished by a municipality has the same rights to reasonableness of rates and equality of facilities as the patron of utility service furnished by any other private corporation.

(*Cases cited under Point VII* (*e*) *supra*).

IX.

A municipality furnishing public utility service owes the same duties and obligations to its patrons that any other private corporation does.

(*Cases cited under Point VII* (*e*) *supra*).

X.

Where corporations engaged in the same character of business, under the same legal duties and obligations, are subjected to different restrictions or burdens, the statute attempting to impose different restrictions on some and not on all, operates as a deprivation of property without due process of law, and is a denial of the equal protection of the laws.

Seaboard Air Line vs. Simon, 56 *Fla.* 545.

XI.

The Fourteenth Amendment to the Federal Constitution and Section 22, Article IV of the Illinois Constitution was intended to secure equality of rights to all people; and this includes equal exemption with others of the same class from all restrictions and burdens of every kind.

3 *Cyc.* 1073.

In re: *Slaughter House Case*, 16 *Wall* 36.

XII.

The attempted exemption of municipally operated commercial plants by Section 10 of the Utilities Act is void, as being in violation of both the State and Federal Constitutional provisions against class legislation, because it is a special immunity granted the commercially operated municipal plant and relieves it from the same

regulations imposed on the like plant of all other private corporations.

(a) The Fourteenth Amendment to the Federal Constitution provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(b) Sec. 22, Art. IV of the State Constitution provides: "The General Assembly shall not pass any local or special laws in any of the following enumerated cases, that is to say, for * * * * Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. *In all other cases where a general can be made applicable, no special law shall be enacted.*"

(c) An immunity is a right peculiar to some individual or body; an exemption from some general duty or burden; a personal benefit or favor granted by law contrary to the general rule.

Exparte Levy, 43 *Ark.* 42;

Locke on Civil Government, Sec. 142;

Cooley Const. Lim. Marginal, p. 392.

(d) "Corporation" as used in Sec. 22, Art. IV of the State Constitution includes municipal corporations.

People vs. Fox, 247 *Ills.* 402, *at* 408;

School vs. Ins. Co., 103 *U. S.* 707.

(e) The legislature can not take what may be deemed a natural class, split that class in two, and

arbitrarily designate the fractures of the original unit as two classes, and thereupon enact different rules for the government of each.

1 *Dillon Mun. Corp., Sec.* 150;

People vs. Kewanee, 262 *Ills.* 255, *at* 262.

(f) Such pretended classification is illusory and unconstitutional.

L'Hote vs. Milford, 212 *Ills.* 418;

Matthews vs. People, 202 *Ills.* 389;

Bessette vs. People, 193 *Ills.* 334;

Badenoch vs. Chicago, 222 *Ills.* 71.

(g) Arbitrary selection can not be justified by calling it classification.

So. Ry. vs. Green, 216 *U. S.* 400, *at* 417;

Starne vs. People, 222 *Ills.* 189;

In re: Case, 20 *Idaho*, 128;

Louisville R. R. vs. R. R. Com., 19 *Fed.* 679;

Johnson vs. Goodyear, 127 *Col.* 4;

Ballard vs. Miss. Co., 81 *Miss.* 507;

Richey vs. Ry. Co., 176 *Ind.* 542.

(h) The classification must always rest upon some difference which bears a reasonable and just relation *to the act* in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.

Connolly vs. Union Co., 184 *U. S.* 541, *at* 556;

State vs. Ry. Co., 124 *Tenn.* 1;

Lavallee vs. Ry. Co., 41 *N. W.* 974;

Johnson vs. St. Paul, 45 *N. W.* 156;

Bedford Quarries vs. Baugh, 80 *N. W.* 529;

Seaboard vs. Simon, 56 *Fla.* 545;

8 *Cyc.* 1073.

(i) The act in respect to which classification is proposed is the *commercial operation of an electric light plant*, and the act is identical whether performed by a municipality (*quo ad hoc* a private corporation) or any other private corporation.

XIII.

The regulation provided for in the Municipal Ownership Act is not the same kind provided for in the Utilities Act.

(a) The Illinois Utilities Act is one of the most comprehensive, detailed and compulsory governmental regulatory acts for public utilities yet adopted by any state.

See copy of act, Post, appendix, p. 3.

(b) The regulation provided by the Municipal Ownership Act is a permissive proprietary regulation and in no sense a mandatory governmental regulation; it simply authorizes the owner of the utility to fix the rates and "make all needful rules and regulations in relation thereto."

Municipal Ownership Act, Sec. 1, *Post, appendix, p.* 64.

(c) The permissive proprietary regulation of the M. O. Act merely confers on the municipality the powers that any other private corporation has to *initiate* rates and rules, and leaves the municipality, like any other corporation, subject to the final governmental regulation of the state.

Beale & Wyman on Railroad Rate Regulation, Sec. 1326;

Manitowac vs. M. & N. T. Co., 129 *N. W.* 925, *at* 930;

R. R. Com. Cases, 116 *U. S.* 330;

So. Ry. Co. vs. Campbell, 230 *U. S.* 537, *at* 550.

(d) To construe the authority to make "needful rules and regulations" as being a provision for mandatory governmental regulation is to render it void in violation of the State Constitution as effecting a grant of power not expressed in the title of the M. O. Act.

Section 13, *Article* 4, *Illinois Constitution.*

Sutter vs. Peoples Gas Co., 284 *Ills.* 634, *at* 646.

(e) The power to initiate rates and make proprietary rules and regulations is germane to the proprietary power of acquiring and operating a utility, but the power of regulation in the governmental sense is not germane to the grant of a proprietary power to acquire and operate.

(f) The relinquishment by a state of its *governmental* power to regulate will never be inferred, but must be expressed in unmistakable language.

Home Tel. Co. vs. Los Angeles, 211 *U. S.* 265;

Milwaukee vs. Wisc. Com., 238 *U. S.* 174;

Puget Sound Co. vs. Reynolds, 244 *U. S.* 574.

XIV.

The reason assigned by the Illinois Court, as a substantial distinction, justifying the exemption of municipal plants, viz: that because municipal records are open to inspection it is not necessary to require their utility rates to be published and approved by the State Commission, is untenable.

XV.

The only other reason assigned by the Illinois Court as a substantial distinction, justifying the exemption of municipal plants, viz: that they may not profit to the *same* extent as plants operated by other private corporations, is not tenable. (Trans. p. 46).

(a) No private corporation operating a utility is entitled to more than a reasonable profit.

(b) There is no language in the act itself manifesting any intention to deny a reasonable profit to the municipality.

M. O. Act, Post, appendix p. 64.

(c) The express power authorizing the municipality to own and operate a utility implies the right to a reasonable profit.

Wagner vs. Rock Island, 146 *Ills.* 139;

Chicago vs. Ins. Co., 218 *Ills.* 43;

Pond on Municipal Ownership, Sec. 11;

Butler vs. Karb, 96 *Ohio St.* 472;

Andrews vs. South Haven, 187 *Mich.* 294;

Torrent vs. Muskeegon, 47 *Mich.* 115;

Henderson vs. Young, 119 *Ky.* 224.

(d) The revenue specified by the M. O. Act insures a reasonable profit, but does not prohibit an exorbitant rate.

Sec. 12, *M. O. Act, Post appendix, p.* 67.

XVI.

The Illinois Court's position that the M. O. Act requires reasonable rates is inconsistent with its position

that the city may not profit to the same extent as other private corporations. (Trans. p. 49).

XVII.

Under the Illinois Court's interpretation of the M. O. Act that the city must fix rates sufficient to produce the revenue specified (Sec. 12)—*no higher, no lower*—the city can not be required to fix reasonable rates. (Trans. p. 46).

XVIII.

Any legislative attempt to deny the city profits to the same extent as that granted other corporations in the operation of a utility would be unconstitutional.

XIX.

That one owner may not profit to the same extent as another does not constitute the kind of difference that justifies its exemption from regulation.

XX.

The elimination of the provisions exempting municipally owned utilities does not extend the scope of the Utilities Act beyond the intention of the legislature, as by Section 83 it expressly manifested its intention to exempt municipalities only in the event it could do so without violating the constitution.

Wood vs. Phila., 46 *Pa. Sup. Ct.* 573;

Com. vs. DeSaito, 62 *Pa. Sup. Ct.* 184;

State vs. Baker, 44 *N. E.* (*Ohio*) 516;

Com. vs. Petranich, 66 *N. E.* (*Mass.*) 807;

Powell vs. State, 69 *Ala.* 10;

McCreery vs. State, 73 *Ala.* 480;

State vs. Deschamp, 53 *Ark.* 490;

State vs. Marsh, 37 *Ark.* 356;

McLaury vs. Watelsky, 39 *Tex. Civ. App.* 394;

Glover vs. State, 126 *Ga.* 594;

State vs. Scampini, 77 *Vt.* 92.

(a) Section 83 expressly provides that if any portion of the act is held to be unconstitutional such decision shall not affect the validity of the remaining portion. (Post appendix, p. 63).

(b) When the unconstitutional part is in fact separable and independent such an intention as expressed in Section 83 is binding on the courts.

State vs. Clausen, 65 *Wash.* 156;

Am. Ex. Co. vs. Beer, 107 *Miss.* 528;

Saari vs. Gleason, 148 *N. W.* (*Minn.*) 203;

State vs. Carter, 174 *Ala.* 266;

In re: Schuyler, 167 *Cal.* 282;

Opinion of Justices, 55 *Colo.* 117;

Ormsby vs. Kearney, 37 *Nev.* 314;

Sallee vs. Dalton, 213 *S. W.* (*Ark.*) 762;

Snetzer vs. Gregg, 129 *Ark.* 542;

Michaelson vs. Wall, 108 *Atl.* (*N. J.*) 145;

Borgnis vs. Falk, 147 *Wisc.* 327;

State vs. Bancroft, 148 *Wisc.* 124;

6 *Ruling Case Law*, *Sec.* 122, *p.* 125.

(c) The provision exempting municipal plants is separable and independent and is not necessary to the accomplishment of the *main* purpose of the act, *viz*: a comprehensive, detailed mandatory regulation of public utilities.

Sabre vs. Brooklyn R. R. Co., 85 *Atl.* 693;

Berea College vs. Ky., 211 *U. S.* 45.

ARGUMENT.

I.

NO TECHNICAL QUESTION OF PROCEDURE IS INVOLVED.

As defendant's counsel conceded in their brief in the Illinois Supreme Court that the Circuit Court took the whole cause on the question of the equity of the bill, no technical question of procedure is involved, and the merits of the controversy alone remain for determination. In its opinion the Supreme Court says (Trans. pp. 40-41):

> "There was a hearing on the bill, answer and exceptions, and the court entered a decree dismissing the bill for want of equity * * * * The parties have treated the issues in the case as questions of law, precisely as if they had arisen on a demurrer to the bill. In disposing of this appeal the court will also indulge in that same assumption. The question for decision in the case is whether or not a municipality in this state owning and operating an electric light plant for the production of electricity for its own use and also for the sale thereof to private consumers is subject to the provision of the act and to the supervision of the Public Utilities Commission."

II.

INJUNCTION IS THE PROPER RELIEF.

The proposition that one lawfully operating a utility, may have an injunction against another operating with-

out authority of law, a similar utility, which competes with and injures the former's business, has the sanction of every court passing on the question. (Brief ante p. 14.) At no stage of this proceeding has the defendant argued plaintiff is not entitled to the relief if the municipal plant is subject to the provisions of the Utilities Act. The Illinois Court agrees with the proposition, but holds it has no application because the attempted exemption is constitutional. (Trans. p. 40). The decision of the case, therefore, turns on the constitutionality of the attempted exemption of municipal plants from the regulation provided for all other plants.

III.

THE MODERN MUNICIPALITY HAS TWO SEPARATE AND DISTINCT ENTITIES.

A true concept of the constitutional question here involved is obtained only by a careful and discriminating consideration of the dual status of the modern municipality—governmental and private.

Dillon on Municipalities, (4th Ed.), Vol. I, Sec. 66, speaking of municipalities, says:

> "That these, as ordinarily constituted, possess a double character: the one governmental, legislative or public; the other in a sense, proprietary or private. * * * * In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited or prescribed *political* powers, to be exer-

cised for the *public good on behalf of the state* rather than for itself * * * * But in its proprietary or *private* character the theory is that the powers are supposed not to be conferred * * * * from considerations connected with *government* at large, but for the *private advantage* of the compact community which is incorporated as a *distinct legal personality or corporate individual.*"

This dual character has been recognized by the courts of practically every state in the Union and in many decisions of this court. (Brief ante pp. 17-21.)

In Vilas vs. Manila, 220 *U. S.* 345 *at* 356, it is said:

"In one character the municipal corporation is a governmental sub-division, and for that purpose exercises by delegation a part of the sovereignty of the state. *In the other character it is a mere legal entity or juristic person.* In the latter character it stands for the community in the administration of local affairs *wholly beyond the sphere of the public purposes for which its governmental powers are conferred.*"

Or as the New York court expressed it in the early case of *Lloyd vs. New York*, 5 *N. Y.* 369, quoted with approval by this court in *Vilas vs. Manila, supra*:

"The corporation of the City of New York possesses two kinds of powers: one governmental and public, and *to the extent* they are held and exercised, *is clothed with sovereignty;* the other private, and *to the extent* they are held and exercised, *is a legal individual.* The former are *given and used* for public purposes, the latter for *private* purposes.

While in the exercise of the former, the corporatio
is a *municipal government;* and *while in the exerci*
of the latter, is a *corporate legal individual.*"

As we have shown in our brief (ante pp. 17, 18, 20
the Supreme Court of Illinois has continuously and consi
tently recognized this dual character from the occasio
of its first appearance in 1850, in the case of *Richland v*
Lawrence, 12 *Ills.* 1, down to the opinions of that court i
the very case at bar (Trans. pp. 48-50).

IV.

THE RIGHTS OF A MUNICIPALITY ARE DETERMINE BY THE CAPACITY IN WHICH IT ACTS.

The existence of this dual character, and these tw
separate and distinct entities, has not been proclaimed b
the courts as a mere academic matter, but in each an
every case it has been for the express purpose of dete
mining the *rights and liabilities* of the municipality. I
every instance when it appeared the municipality w
acting in its private corporate capacity, or exercising i
private corporate functions or powers, the courts ha
universally held that its rights, duties and obligatio
were those of a private corporation, and not those of
municipality in the sovereign or governmental sense.

The first case arising in Illinois is *Richland vs. La*
rence, 12 *Ills.* 1, where the legislature appropriated mon
for Lawrence County and by a subsequent act directe
a portion of the money to be paid to Richland Count

Lawrence County contended that the first act of the legislature made the money its property and placed it beyond the subsequent control of the legislature. The court held the first appropriation was to the county in its public capacity and therefore subject to legislative control, saying, (p. 8):

> "That the state may make a contract with, or a grant to, a public municipal corporation, which it could not subsequently impair or resume, is not denied; but in such case the corporation is to be regarded as a private corporation. A grant may be made to a public corporation for purposes of private advantage, and although the public may also derive a common benefit therefrom, *yet the corporation stands on the same footing as respects such grant, as would any body of persons upon whom like privileges were conferred.*
>
> Public or municipal corporations, however, which exist only for public purposes, and possess no powers except such as are bestowed upon them for public, political purposes, are subject at all times to the control of the legislature, which may alter, abolish or modify them at pleasure."

The foregoing doctrine is announced and applied in *Hunter vs. Pittsburgh*, 207 *U. S.* 161, *at* 178, where this court says it has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties; and then decides, under the facts in that record, that the property involved was held by the municipality in its governmental capacity and may be resumed by the state without violating any vested right.

The capacity in which a municipality acted, determined its rights in *Illinois Trust Co. vs. Arkansas*, 76 *Fed.* 271, where it was contended the city council had no power to make a contract granting the use of the streets to a water company and agreeing to pay rental for hydrants for 21 years, because "such action would circumscribe the *legislative* powers of their successors." Denying this contention the court said:

> "First, it ignores the settled distinction between the governmental, or public, and the proprietary, or business, powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereign and *governs its people;* the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule herein invoked. In their exercise it is *ruling its people* and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, *and it may exercise, the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation.* (Citing many cases).

"In contracting for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. *The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself, and its denizens,* 1 *Dill. Mun. Corp., Sec.* 27; *City of Cincinnati vs. Cameron,* 33 *Ohio St.* 336, 367; *Safety Insulated Wire & Cable Co. vs. City of Baltimore,* (66 *Fed.* 140), *supra,* and cases cited under it."

In every case in which it was made to appear that the municipality was acting in its private or proprietary capacity as distinguished from its public or governmental capacity, the Illinois Courts have consistently and persistently held that its rights, duties and liabilities were identical with those of a private corporation. (Brief ante pp. 17, 18, 20.)

In *Gregston vs. Chicago,* 145 *Ills.* 451, an estoppel was pleaded against the city. The court recognizing that a municipality can not be estopped while acting in its governmental capacity, held in that case the city was acting in its private capacity, saying (p. 461):

"The city through its constituted authorities, in granting the permit upon the covenants, conditions and limitations contained in the bond taken by the city from Gregston, was, therefore, acting in its private corporate capacity, as distinguished from its public and political, or governmental capacity, and the doctrine applicable to the exercise of its public political powers does not apply. (Citing cases) • • • • The city when acting in its private capacity, as contradistinguished from its governmental

capacity, is bound by its contracts and may be estopped by the conduct of its proper officers when acting within the scope of their lawful power."

(Citing many Illinois cases).

In *Chicago vs. Selz Schwab*, 202 *Ills.* 545, the court had to determine whether the city was liable under the doctrine of *respondeat superior* for the negligent acts of its officers. This depended upon the capacity in which the city was acting. In that case the court said, (p. 550):

> "A city is not liable, under the doctrine of *respondeat superior*, for the unlawful or negligent acts of its officials in the exercise of the police power, and if the break had resulted from the negligence of firemen engaged in the line of their duty in extinguishing a fire the defendant would not be liable. (*Wilcox vs. City of Chicago*, 107 *Ills.* 334; *Culver vs. City of Streator*, 130 *id.* 238). The injury to plaintiff did not arise from negligence in the use of the hydrant for the purpose of extinguishing fire. The business of selling water to inhabitants and street sprinkling contractors is not an exercise of the police power, and the city is not exempt from liability for negligence in maintaining such system."

To the same effect is *Palestine vs. Siler*, 225 *Ills.* 630, where in support of its opinion the court quotes from 1 *Dillon on Municipal Corporations, Sec.* 27, as follows:

> "A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. If this power is granted to a borough or city it is a special private franchise, made as well for the private emolument and ad-

vantage of the city as for the public good. In separating the two powers, public and private, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character; but if the grant was for purposes of private advantages and emoluments, though the public may derive a common benefit therefrom, the corporation, *quo ad hoc,* is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

In *People vs. Schlitz,* 261 *Ills.* 22, the court held the city could not treat water charges as taxes because in furnishing water it was acting in its private capacity. There the court said, (p. 25):

"When a municipality goes into the business of furnishing water, while such business is more or less public in its nature, it does so not in the capacity of local sovereignty. (*Wagner vs. City of Rock Island,* 146 *Ill.* 139.) The obligation of the consumer to pay rests upon a contract entered into between the city and the consumer, which contract the consumer had an option to make or not, as he pleased. The municipality has the right to charge for the service when the contract has been made and performed on its part, and the statute gives a lien upon the premises and real estate of the consumer so supplied with water by the municipality and such charges can be collected and the lien enforced, but such contractual relation does not give the municipality the authority or power to collect these charges *as delinquent taxes* under our Revenue law."

In *South Carolina vs. U. S.*, 199 *U. S.* 437, the right of a state to be exempt from Federal taxation was made to turn upon whether the state was acting in its governmental or private capacity. There this Court said (p. 463):

> "Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a state in the discharge of its functions. *It it reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a state engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation.*"

In our brief ante p. 17, we have cited many cases holding that the rights of a municipality are made to depend entirely upon the capacity in which it acts. No cases to the contrary can be found. The significance of this universal holding is far reaching. Why shall not the rights of the City of Springfield (defendant in the case at bar), as to its exemption from the Utilities Act, be made to depend on the capacity in which it acts in selling electricity?

V.

IN SELLING ELECTRICITY THE DEFENDANT IS ACTING SOLELY IN ITS PRIVATE CAPACITY.

Like all other courts dealing with the question, the Illinois court is firmly committed to the doctrine that a municipality in furnishing a public utility service is acting in its private as distinguished from its governmental capacity.

The Illinois case most frequently cited is *Wagner vs. Rock Island*, 146 *Ill.* 139, where, at 154, the court unequivocally says:

> "A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a *private* corporation."

In *Palestine vs. Siler*, 225 *Ill.* 630 *at* 636, it repeated the above language and applied it to the sale of electricity by a city, as again in *People vs. Schlitz*, 261 *Ill.* 22 *at* 25, it applied it to water service. In its opinion in the case at bar (Trans. p. 48), it says:

> "We may concede that the operation by a municipality of an electric light plant for the furnishing of light or power to private consumers for gain can not in any sense be the performance of a governmental function."

In re *Rapid Transit Comrs.*, 197 *N. Y.*, 81 *at* 96, the New York Court says:

"The subway is a business enterprise of the city, through which money may be made or lost, the *same* as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a *proprietor, not a sovereign.*"

The New Jersey Court, in *Karkenski vs. So. River*, 83 *Atl.* 639 *at* 641, says:

"The operation of an electric lighting plant for the furnishing of light to private consumers for gain, *can not in any sense be the performance of a governmental function.*"

In *Henry vs. Lincoln*, 140 *N. W.* 665, the Supreme Court of Nebraska holds:

"It is no part of its (a city's) duty, as a municipal corporation, to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part, and it thereby assumes a third relation, separate and distinct from the dual relations above considered. While occupying this third relation no governmental functions or corporate duties, *as a municipality*, devolve upon it."

In *Los Angeles vs. Los Angeles Co.*, 241 *Fed.* 912, it is said:

"*Whatever the city does, however, in the matter of actually engaging in the furnishing and delivering of electrical energy to itself and its inhabitants is done in its proprietary or quasi private capacity.* (*Walla Walla vs. Walla Walla Water Co.*, 172 *U. S.* 1, 8, 10, 19; *Sup. Ct.*, 77, 43 *L. Ed.* 341; *South Pasadena vs. Pasadena Land Co.*, 152 *Cal.*, 579, 593, 93

Pac. 490; *Safety Insulated Wire Co. vs. Baltimore*, 66 *Fed.* 140, 143, 13 *C. C. A.*, 375), *and the two must always be differentiated in any attempt to define and determine the rights of a city in such controversy as the present.*

The decision in that case was affirmed by this court (251 *U. S.*, 32), where this court said:

> "The court reasoned and concluded that what the city did was done not in its governmental capacity,—an exertion of the police power,—but in its proprietary or quasi private capacity; and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized, and the difference in attendant powers pointed out, in decisions of this court (citing cases)."

VI.

IN SELLING ELECTRICITY THE RIGHTS AND OBLIGATIONS OF DEFENDANT ARE IDENTICAL WITH THOSE OF PLAINTIFF AND ALL OTHER PRIVATE CORPORATIONS.

In selling electricity defendant is *quo ad hoc* a private corporation and *stands upon the same footing* as every other private corporation engaged in the same kind of business. This is the universal holding of the courts, *and no contra decisions can be found.*

Applying its earlier ruling in *Richland vs. Lawrence*, 12 *Ill.* 1, to the sale of water by a city, the Illinois Court in *Wagner vs. Rock Island*, 146 *Ill.* 139 *at* 154, says:

> "If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character; but if the grant was for the purposes of private advantages and emolument, though the public may derive a common benefit therefrom, *the corporation quo ad hoc is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.*"

The foregoing language is reiterated and applied to the sale of electricity by the Illinois Court in *Palestine vs. Siler*, 225 *Ill.* 630 *at* 636.

The Circuit Court of Appeals for the Sixth Circuit, applying the doctrine to the sale of water, in *Audit Co. vs. Louisville*, 185 *Fed.* 349, says (p. 352):

> "The general rule is well established that, where a city is exercising governmental powers, it is closely limited, and clear authority for each such action must be found in the controlling general or special law of the state, but that, when it is exercising the rights of a proprietor in the management of its property, its council and officers resemble the directors and officers of a private corporation, and, in large degree, the powers of these agents and the responsibility of the city for their acts are *governed by the rules applicable to private corporations.*"

The Supreme Court of Nebraska, applying the doctrine to the sale of electricity by a municipality, in *Henry vs. Lincoln*, 140 *N. W.* 665, says:

"It is then engaged in an ordinary business enterprise, and is *bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation.* It is subject to the same liabilities and entitled to the same defenses. No more and no less."

In determining the rights of a consumer of the municipal lighting plant of Waseca, the Supreme Court of Minnesota, in *State vs. Waseca*, 142 *N. W.* 319, holds:

"In our opinion, the water and light board should have given relator electrical power service, and the court should have issued a writ of mandamus requiring it to do so. The city has undertaken to furnish a public utility. *It is to be governed, in its duties and obligations and its rights and obligations by the same rules as those which apply to private persons or corporations doing the same class of service.*"

In *Eaton vs. Weiser*, 12 *Idaho* 544, speaking of a municipal electric plant, the court says:

"Such an engagement or enterprise is not one of the public governmental duties of municipalities.

Municipal ownership, in the usual and common acceptation of the term, *must of necessity carry with it the same duty, responsibility and liabilities that are imposed upon and attach to private owners of similar enterprises.*"

The same position is taken by the Supreme Court of Ohio in *Butler vs. Karb*, 117 *N. E.*, 953, *where at* 956 it says:

"That neither public nor private corporations may discriminate between members of the public with reference to rates and terms of service does not longer admit of controversy. This wholesome rule long in force, has had frequent application, particularly to common carriers and utility companies.

A municipality operating a utility is not exempt therefrom. Acting in a proprietary capacity, we have seen, it should have the freedom of action of a private utility corporation, *but it is also subject to the same restrictions as to practices of discrimination* in rates and service."

The Supreme Court of Missouri, in *Riley vs. Independence*, 167 *S. W.* 1022 *at* 1025, holds:

"Cities undertaking to run the lighting business must assume the same responsibilities as private persons and private corporations, running like plants."

VII.

IN SELLING ELECTRICITY DEFENDANT CAN NOT EXERCISE ANY RIGHT OR POWER CONFERRED ON IT IN ITS GOVERNMENTAL CAPACITY.

Not only have the courts universally held that the rights and obligations of a municipality in operating a commercial utility are identical with those of any other private corporation engaged in the same kind of business, and that the patrons of both plants have the same rights as to service and rates, but the courts have also held that, in operating such a commercial plant, the municipality can not exercise any of its governmental powers or functions.

The Illinois Court is thoroughly committed to this doctrine. The village of Lemont attempted by ordinance to exercise a governmental power by assessing an annual tax against each building to be paid into its water works fund, and the court in *Lemont vs. Jenks*, 197 *Ill.* 363, held the ordinance void as an attempt to impose a tax. In *Chicago vs. Ins. Co.*, 218 *Ill.* 40, the city attempted to collect charges for water service to prior tenants by assessment of a tax against the property. This the court held it could not do, saying (p. 43):

> "Its corporate powers do not require it to furnish water to its inhabitants, but it has the right to do so when it sees fit. But when it does thus furnish its inhabitants with water, it is not by virtue of the exercise of the power of sovereignty, but it is a business which is public in its nature, and belongs to that class of occupations or enterprises upon which public interest is impressed. The water rates are imposed and collected not as a tax, but as a compensation to be paid by those who choose to receive and use the water."

Again in *People vs. Schlitz*, 261 *Ills.* 22, a city attempted to draw the power of taxation from its governmental entity and use it in the operation of its water works for the collection of water charges, and the court held it could not do so, saying (p. 25):

> "The obligation of the consumer to pay rests upon a contract entered into between the city and the consumer, which contract the consumer had an option to make or not, as he pleased. The municipality has the right to charge for the service when the

contract has been made and performed on its pa
and the statute gives a lien upon the real estate a
premises of the consumer so supplied with water
the municipality and such charges can be collect
and the lien enforced, but such contractual relati
does not give the municipality the authority or pow
to collect these charges *as delinquent taxes* under o
Revenue Law."

A flagrant attempt on the part of a municipality
disregard the universal judicial decisions that in oper
ing a utility it is on the "*same footing*" as any oth
private corporation, is disclosed in the case of *Los An*
les vs. Los Angeles, 241 *Fed.* 912. In that case it a
peared that the City of Los Angeles, being about to e
bark in the commercial electric business, passed an or
nance, in the exercise of its *governmental* power, to co
pel the removal and relocation of the poles of already e
isting private electric companies from certain streets,
order that the city might, *in the exercise of its proprieta*
power, more conveniently install its electric wires. O
of the private concerns filed a bill to enjoin, to whi
the city replied that it had the right to exercise its go
ernmental power in aid of its commercial enterprise.

The court denied the right, issued the injunction, a
in a very interesting opinion, from which we venture
quote at length, drew the distinction, and held that t
municipal corporation, included two distinct entities, a
that the private entity was no more than, and entitled
no greater rights than, any other private corporatio
The court (Bledsoe, D. J.) said (pp. 918-919 and 921:

"Whatever the city may do under the guise of the police power, it must be remembered it does in its governmental capacity. * * * *Whatever the city does, however, in the matter of actually engaging in the furnishing and delivering of electrical energy to itself and its inhabitants is done in its proprietary or quasi private capacity,* (citing cases), *and the two must always be differentiated in any attempt to define and determine the rights of a city in such controversy as the present.*

While operating in its private capacity, and considerations of necessity, giving rise to an exertion of the police power, *being nonexistent*, as adverted to hereinabove, the power of police is wanting, and may not be asserted in furtherance of that which is merely expedient. In other words, when acting clearly within the domain of its private and proprietary capacity, the *city may not draw sustenance or power to itself* through an assumption of public and governmental functions. * * *

If the engaging of the city in the business of furnishing electrical energy to itself and its inhabitants is in all respects a purely private venture as thus indicated and *if it is to be accorded the same and no other consideration than any other private venture of the same character*, it would seem undubitably clear that the city, acting in its governmental capacity, would have no authority to *confer rights upon its own lighting system*, based upon and growing out of a destruction and *disregard of the rights of other systems engaged in the same business and standing in the same relation to the law.*"

When the foregoing case reached this court on appeal, the principles announced and their application to

the facts, by the lower court, are approved and the judg
ment affirmed. (251 *U. S.*, 32.)

VIII.

DEFENDANT, IN SELLING ELECTRICITY, BEING QUO A HOC A PRIVATE CORPORATION, CAN NOT BE EX EMPTED FROM THE UTILITIES ACT.

We have cited, and quoted from, the numerous case hereinabove, for the purpose of demonstrating *how firml and universally* the courts have announced and applie the doctrine that when a municipality engages in a com mercial activity, it is *from every view point and for ever purpose, nothing more nor less than a private corpora tion.* We do not believe it is possible to read these de cisions and not be impressed with the deep and far reach ing significance of such judicial pronouncements as:

(a): "In the other character (proprietary) is a mere legal entity or juristic person."

(b): "While in the exercise of the latter (pro prietary functions) it is a corporate legal indivi ual."

(c): "The corporation, *quo ad hoc*, is to be re garded as a private company."

(d): "It stands upon the *same footing* as woul any individual or body of persons upon whom th like special franchises had been conferred."

(e): "It is subject to the *same* restrictions a to practices of discrimination in rates and service.

(f): "It is to be governed by the *same* rules tha govern a private individual or corporation."

(g): "It has no *greater* or *higher* privileges or immunities than are possessed by any other private corporation."

If in selling electricity defendant has no "greater or higher privileges," if it stands on the "*same* footing," if it is to be "governed by the *same* rules," if it is in fact "*quo ad hoc* a private corporation," then no distinction can be made between it and plaintiff in the regulatory statute pertaining to such business. If it is not subjected to the *identical*, comprehensive, detailed, mandatory regulation that plaintiff is by the Utilities Act, then it does not "stand on the *same* footing," it is not "governed by the *same* rules," and it has "greater or higher privileges."

Plaintiff is contending that defendant must meet it in competition for the electric business of Springfield, just as any other private agency would be compelled to meet its competitor, and must stand with plaintiff "*in the same relation to the law*" regulating the business which both are engaged in. In its answer filed in this case defendant avers it is selling current "at about one-half the rates purported to be charged" by plaintiff (Trans. p. 17). Plaintiff in its bill charges that defendant has been soliciting and taking from plaintiff many of its patrons (Trans. p. 10). This the defendant is able to do because it is not subject to the *same* regulation plaintiff is. Plaintiff's rates are fixed by the state commission and

by that tribunal declared to be just and reasonable. Obviously, the "*about one-half*" rates offered by defendant can not also be just and reasonable, and whether the deficit is made up by taxes or some other means, the defendant has an unfair advantage because there is no governmental regulatory body which can examine into its business and require its rates to be just and reasonable on the same basis as that required of plaintiff.

If plaintiff is required to maintain its property and furnish service as provided by the regulations and orders of the state commission, and defendant is not, it is only a question of time, with defendant selling at "about one-half" the rates of plaintiff, when plaintiff will be left with a large investment of property and no business. When plaintiff's property is thus "junked" and plaintiff put out of business, defendant, uncontrolled by any governmental regulatory body, will then be able to fix its rates at whatever it pleases. It is the same sequel which fifty years of unregulated competition brought to every large community in this country. Its dire consequences drove the state to regulatory statutes. The question then is do the laws bear equally on all engaged in this business, when a municipality is exempted from the *same* regulation as other private corporations?

Wisconsin is the parent, in this country, of public utility regulation, and all regulatory acts are to a greater or less extent, modelled on its act, which expressly in-

cludes municipal plants. The actual experience of Wisconsin in the administration of its utility law, shows conclusively that the municipality, in operating a utility, is "*quo ad hoc* a private corporation," and that it is confronted with the same problems as any other private corporation. *Holmes on Regulation of Railroads and Utilities in Wisconsin*, tells of the conditions which make necessary the *same* governmental regulation. At page 206 he says:

> "*Municipally owned plants are as likely to indulge in discriminatory practices as private plants.* This does not necessarily mean practices which are wilfully wrong. *While the community would be on guard against improper practices of a privately owned utility, the municipal plant being part and parcel of the city, the attitude of watchful criticism on the part of members of the community is often missing.*"

Again at pages 278-282, Mr. Holmes says:

"Evils exist under both systems of ownership. The records of complaints before the commission form a safe criterion. Out of forty-four formal cases *relating to municipal plants*, fifteen involved the reasonableness of existing rates. Of sixty informal cases handled during three fiscal years ending June 30, 1912, nearly all involved questions of service, inefficient operation or rate discriminations. In the determination of equitable rates the question of cost analysis is of primary consideration. Its importance has been considered in the discussion of accounting and in the following chapter on the defects of local regulation. Aside from complete records of a plant's

operating costs, it is necessary to have similar statistics gathered on the same basis from other plants, for comparative purposes. These data can be secured only through a system of state supervision. It is through such methods that abnormal operating expenses are eliminated and strict business methods enforced. *Every reason exsists why these same records should be obtained from municipal plants. It makes the managements more efficient and insures a better character of service to the public.*

A municipal plant renders two distinct classes of service: (1) *public*, and (2) *private*. If the city pays nothing for its service, or if it does not pay its proportionate share, as was discovered by the commission in some cases when the utilities law was passed, this is a discrimination in favor of the taxpayer. *If the private service rates are too low, the taxpayers are discriminated against in being compelled to make up the balance.* It is but fair that each class should shoulder its own burden, and that each individual consumer should pay as nearly as it is practicable to determine his share of the cost of operating the plant. *The discriminations in rates that existed when state regulation was inaugurated were prevalent in municipal as well as private plants.* The complaints that have since been received from taxpayers, consumers and city authorities indicate that the public has come to realize clearly that rates for municipal plants should closely adhere to the cost of the service.

Rates to be charged by municipal plants are computed on the same principles and methods as are used in determining the reasonableness of rates in private plants. Accurate operating records, com-

parative cost figures, and an unprejudiced view of local conditions are essential. The reasons why the municipality cannot secure these records independently of a state commission are so fully discussed in the following chapter that no discussion of them will be attempted here. *Every argument that obtains for state regulation has the same force in considering the question of the state regulation of municipal enterprises.*

One of the most tedious tasks that has been imposed upon the commission has been to impress upon the managements of municipal utilities the desirability of accurate financial records of plant operation, kept on a uniform basis. Before inequalities can be eliminated this is indispensable. That these inequalities do exist is well illustrated in the case of the Cumberland Municipal Electric Light Plant, in which the commission said:

'The applicant in this case desired to increase certain of its present rates for electric current, on the ground that these rates are inadequate and did not cover the cost of furnishing the service involved. Upon hearing and investigation it was found that the applicant's rate schedule was not properly adjusted and that certain classes of consumers paid less than their just share of the cost of operating the plant. Because of these facts the commission endeavored to compute more equitable schedules of rates, and has authorized the applicant to put these rates into effect.'."

King on Regulation of Municipal Utilities, pp. 53-

4, says:

"*Public ownership and operation does not dispense with the necessity for regulation. The problem remains the same as under private operation.* Under both there must be economy, efficiency and fidelity. *The two arms of administration by which these qualities are obtained are inspection and scientific accounting.* When the Wisconsin Commission investigated the books of municipal plants, it found that books were kept by but a few, and that, in the main, the only memoranda were check-book stubs. The bookkeeping affairs of one municipal plant were kept in a vest-pocket account book, tied with a woolen string. A majority of the municipal plants received no credit for the services rendered to the city. *The revenue went into the general fund and when there was an expense the city made an appropriation.* Business system was unknown. The accounts of municipal plants are in the same need of efficient supervision as the accounts of private plants, and for the same reason. In no other way can competent public service be assured. *Slipshod accounting methods and political financial reports may cover up the real cost of utilities and thus mislead the public into thinking that a great saving is being made when the fact is just the opposite. Patrons of municipal plants are entitled to the same protection as patrons of private plants.* The same is true of inspection. It is as necessary to watch for the infidel in the public employ as it is to watch for the infidel in the private employ. It will take as efficient a corps of inspectors to keep municipal property up to high standards as to keep private property up to a high standard."

The exemption of municipalities from the operation of the Utilities Act amounts to the granting of a special or exclusive privilege or immunity, which will enable municipalities to ruin and drive out of business any private corporation or individual seeking to carry on the business of producing and selling electrical energy in competition with them.

The actual effect of such a construction is to place plaintiff, a regulated utility, subject to all the provisions of the Utilities Act, in competition with defendant, an unregulated, irresponsible, political machine, which, by reason of its immunity from the supervisory power of the state commission, can enter into a competitive war with plaintiff, using its governmental function in aid of its private enterprise, supplying deficits in operation from taxation without fear of discovery, and *by the use of its governmental, unregulated and unsupervised power, destroy its competitor.*

Then, after fear of competition is thus removed the monopoly, created under guise of a legal exemption from regulation and supervision, can turn upon its helpless customers and engage in any species of discrimination or rate extortion which seems to its political rulers to their best advantage.

The politico-economical aspect of the situation is well presented in 4 *Dillon Mun. Corp.* (*5th Ed.*), *Sec.* 1291.

It may be said that this court has naught to do with the politico-economic aspect, and this is true. What we have just said is merely in confirmation of our proposition that the exception in Section 10 of the Utilities Act, as construed by the lower court is undeniably, in violation of the Federal Constitution and would be vicious "class legislation."

As the court said in *Los Angeles vs. Los Angeles*, 241 *Fed.* 912:

> "As indicated hereinabove, assuming the necessity, propriety and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain or otherwise, has lawfully and properly and justly eliminated competition, *it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade.*"

IX.

THE CLASSIFICATION MUST REST UPON SOME DIFFERENCE WHICH BEARS A REASONABLE AND JUST RELATION TO THE BUSINESS OF SELLING ELECTRICITY.

There is no room for disagreement or argument as to the principles which must guide and control the determination of what is a just classification. In *Connolly vs. Union Pipe Co.*, 184 *U. S.* 541, *at* 560, this court said:

> "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation *to the act* in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. * * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, Colorado and Santa Fe Railway vs. Ellis*, 165 *U. S.* 150, 155, 159, 160, 165. These principles were recognized and

applied in *Cotting vs. Kansas City Stock Yards C*
183 *U. S.* 79, in which it was unanimously agreed th
a statute of Kansas regulating the charges of a pa
ticular stock yard company in the state, but whi
exempted certain stock yards from its operation, w
repugnant to the Fourteenth Amendment in that
denied to that company the equal protection of t
laws."

Under that test, we submit that the enactment of t
Utilities Act providing for commission regulation of pu
lic utilities is a regulatory statute which must apply
and be effective upon *all* entities, municipal, corporat
or individual, which engage in the business of supplyi
any public utility commodity for hire or charge, and th
there is no such real or substantial distinction betwe
a municipality, in its private corporate entity so doi
and any other private corporate or individual entity.

As we have shown, the municipality in serving t
public for hire, is divorced entirely from all attributes
sovereignty, and comes into the market with its co
modity upon exactly the same basis as any private co
poration or individual. It cannot so correlate its gover
mental function with its private as to give itself a
advantage over its non-municipal competitor, but it mus
in the homely phrase, "like every other tub, stand on i
own bottom."

There being no distinguishing feature in the fun
tioning of the enterprise, in the physical attributes, th

commodity produced or the method of sale and distribution, in short, in any of the activities of a privately operated and a municipally owned or operated commercial plant, the mere fact of municipal ownership or operation does not constitute, for purposes of classification, a "difference which bears a reasonable and just relation *to the act* in respect to which the classification is proposed." (*Union Pipe Co. case, supra*).

The "act in respect to which the classification is proposed" is *the commercial operation of an electric light plant*. As a public policy question, it has been determined by the legislature that *that act* needs regulation by a state commission. The legislature had power to enact a law for the regulation of the act, the business, and in doing so it must include in the regulatory statute power over every agency or medium which performs that act or carries on that business.

It cannot provide that the act or business when carried on through one agency or medium shall be subjected to regulation and when carried on through another shall be exempt from regulation, thus granting a special immunity to the latter. The criterion upon which the classification is to be made must be the business itself, not the owner or operator of the business. This is the underlying principle upon which all the cases upon classification rest.

The validity of a classification must depend, not u
the character of the agency, by which the act is to be
formed, but upon the act itself— the business or funct
Classification must be based upon the result to be acc
plished, not upon the particular entity which is to
complish the result. There can be no justification fo
classification of individuals, corporations or co-partn
ships based upon the characteristics of the perform
agency, when the performed function is the same.
the functioning of the various agencies is identical
variant characteristics and personnel of the agen
affords no ground for classification of the agencies i
privileged and non-privileged classes.

The proposition is expressed in the opinion in *St*
vs. N. C. & St. L. Ry. Co., 124 *Tenn.* 1, in the follow
language:

> "We do not hold that there may not be a cla
> fication of corporations, or of employers, for t
> question is not involved. Where such classificat
> is natural and reasonable, and *based upon some*
> *tinctive difference in the business* of the seve
> classes, a difference peculiar to and inhering in
> very nature, it is valid, and will be sustained."

In *Lavallee vs. St. Paul, etc. R. Co.*, 41 *N. W.*, 9
the court says, passing upon an act abolishing the
fence of "fellow servants" as to corporate employees:

> "But no just reason can be suggested why s
> difference should be founded, *not on the charac*

of the employment, but on the character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but cannot see why *one individual or corporation* should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same."

In *Johnson vs. St. Paul, etc. R. Co.*, 45 *N. W.* 156, the court said:

"If a distinction is to be made as to the liability of employers to their employes, it must be based upon a difference *in the nature of the employment, and not of the employers.*"

The court in *Bedford Quarries Co. vs. Baugh (Ind.)*, 80 *N. W.* 529, reviewing a large number of cases dealing with the question of classification, said:

"The fact must not be forgotten that the small industry still exists, and that under the convenient form of corporate capacity men still carry on industrial undertakings *which are in no essential particular different from those which are carried on by copartnerships and individuals. It is this fact which makes a classification on the basis of the character* of the employer inherently vicious."

In *Seaboard Air Line vs. Simon*, 56 *Fla.*, 545, which is selected as a leading case by the editors in 16 *Ann. Cas.* 1234, the court said:

"(P. 551): Where persons, or corporations engaged in the same character of business, under practically the same legal duties and obligations, are subjected to different restrictions or burdens, with ref-

erence to the duties and obligations of such business, and there are no legal or natural, practical and reasonable differences of a material or substantial nature in the duties owed by them *in the subject regulated*, which justify a difference in regulations of the duties and obligations, *with reference to the business engaged in by all*, the different restrictions or burdens imposed on some and not on all similarly conditioned may operate as a deprivation of property without due process of law, and as a denial of the equal protection of the laws. See 8 *Cyc.* 1073."

* * * * * * * *

(P. 554): "The constitutional guaranty of due process of law requires that statutes shall operate upon all alike under practically similar conditions; and if a statute, in providing a regulation, arbitrarily or unjustly discriminates between persons or corporations *that are similarly conditioned with reference to the duties regulated*, the organic provisions securing property rights may be violated. No greater burdens should be laid upon one than are laid upon others, *in the same calling and condition with reference to the subject regulated.*"

We submit, with deference, that under the generally established and recognized principles of classification, there is no justification for the immunity attempted to be granted to municipal corporations in their purely private capacities, by Section 10 of the Utilities Act, and therefore a construction which would so construe the exception, would render it (the exception of municipal corporations from the regulatory features of the Utilities Act), unconstitutional and void.

Aside from the considerations presented, showing that there is no legal basis for a classification based upon the mere circumstances that the commercial plant is being operated by a municipal corporation in its private capacity, it appears that the pretended exception would, on the construction made by the lower court, *exempt a private corporation lessee of a municipally owned plant, from the Utilities Act.*

Under the Municipal Ownership Act, a city may construct its own plant and lease it to an Illinois corporation for 20 years.

The parenthetical clause in Section 10 of the Utilities Act, relied upon to except commercially operated municipal plants from the regulation of the Commission, is as follows:

> "Except, however, such public utilities as are or may hereafter be owned or operated by any municipality."

It will be observed that the exception is not only of plants *operated* by the municipality, but when any plant *is owned by the municipality and leased to a private corporation and operated by it, such private corporation is excepted from commission regulation.*

A clearer case of unconstitutional, vicious classification would not well be imagined. The Utilities Act subjects every privately owned and operated utility in the state to Commission regulation. That this is a burden

upon the utility cannot be denied, nor can it be denied that to relieve one class of privately operated plants from that burden would be a valuable immunity to that class.

For example, it could not be denied that to subject all utilities operated by corporations to Commission regulation, and to relieve utilities operated by individuals therefrom, would be unconstitutional, as granting a special immunity to the individuals without just reason. Yet, under the decision of the lower court, an exception of public utilities "owned OR operated" by municipalities is valid, when upon the face of it, this exception permits the operation of the municipal plant to be farmed out to a private corporation which, by virtue of the mere ownership of the plant by the city, is exempted from the burden of commission regulation. A more cunning and vicious method of avoiding commission regulation could not be devised.

The lower court does not recede from the position that the municipality, in furnishing utility service, is *quo ad hoc* a private corporation, nor does it dissent from the universal judicial decisions that in carrying on such business the city is "on the same footing," is "governed by the same rules," has "no greater or higher privileges" and is "subject to the same restrictions" as all other private corporations engaged in the same business. The court even announces that it has no disagreement with the proposition that the city in supplying utility service does so in its private and not its governmental

capacity. It says this principle has been announced by it and many other courts, but that such decisions are "mostly in cases for personal injuries" (Trans. p. 48), while as a matter of fact no other court has failed to apply the principle in determining the rights and obligations of a city, irrespective of the matter out of which the controversy arose.

After all these concessions the lower court says "such established principle can furnish no reasonable basis" for the argument that such municipalities must be put in the same class with all other private corporations for the purpose of regulating the business they are all engaged in (Trans. p. 48). Notwithstanding the municipality is "*quo ad hoc*" a private corporation, notwithstanding it "is on the same footing," notwithstanding it is "governed by the same rules," notwithstanding it is "subject to the same restrictions," notwithstanding it "has no greater or higher privileges," the lower court attempts to justify its exemption from the same regulation, upon two grounds, *viz*:

(1) That there is a substantial distinction between such municipality and all other private corporations which differentiates in important particulars "having some reasonable and just relation to the *purpose of the law*" (Trans. p. 45); and

(2) That the Municipal Ownership Act provides regulation for municipal plants, and therefore the consumers of municipal plants are "just as com-

pletely protected from exorbitant rates and unjust discrimination as the consumers are under the Public Utilities Act (Trans. p. 49).

The only specific differences which defendant's counsel attempted to point out proved to be merely differences in the methods of acquiring property, and not differences in the business regulated. In reversing its first judgment the lower court does not adopt any of the so-called differences claimed by defendant, but advances two entirely new theories.

We now propose to show that the distinction between the municipality and other private corporations, upon which the lower court bases its decision, does not in fact exist, and that if the legislature had attempted to create such a distinction it would be void for want of power in the legislature.

X.

EVEN IF MUNICIPAL RECORDS ARE OPEN TO INSPECTION THAT IS NOT A SUBSTANTIAL DIFFERENCE JUSTIFYING THE CLASSIFICATION.

The first difference suggested by the lower court as a justification for the exemption of municipal plants is that municipal records are open to the public and therefore it is not necessary to require their rates to be published as provided by the Utilities Act. The lower court says (Trans. p. 45):

"To enable consumers to protect themselves against exorbitant rates and unjust discrimination, without compelling them in the first instance to resort to their right to a hearing under the act on the question of rates, Sections 33, 34 and 35 were incorporated in the Public Utilities Act requiring the filing of schedules of rates and the posting and publishing of the same. No such requirement is necessary for the protection of the consumer when the utility is owned and operated by the municipality. Before the enactment of the Public Utilities Act the records of public utilities owned by private corporations or private persons were free from public inspection. Municipalities speak only by their records which are always open to inspection."

The records of a municipality pertaining to rates charged in the operation of a commercial utility are governed by the same rules as those of any other private corporation operating a utility. If the records of private corporations were free from public inspection so were those of a municipality which pertain to the operation of a commercial plant. Unless this is so, the universal judicial pronouncements that in operating a commercial plant the municipality "stands on the *same* footing," is "governed by the *same* rules," and has the "*same* rights and obligations," as any other private corporation, are meaningless.

If the requirement of posting and publishing of rates provided by the Utilities Act is necessary to protect consumers of private plants against exorbitant rates and

unjust discrimination because their records were free from public inspection, then by the same reasoning the posting and publishing of the commercial rates of a municipal plant is necessary for the protection of the municipal consumer, because as to such, the records of the municipality are free from public inspection.

XI.

THE ONLY OTHER DIFFERENCE ASSIGNED BY THE LOWER COURT IS THAT A MUNICIPAL PLANT MAY NOT PROFIT TO THE SAME EXTENT AS A PRIVATE PLANT.

The only other difference assigned by the lower court is stated by it as follows:

> "Municipalities under the Municipal Ownership Act are *limited* in rates and charges for the product furnished by their public utilities, and can not operate them at a profit *to the same extent* as can private corporations, associations or persons owning like utilities."

Such a theory of difference has never before been advanced in this or any other case, and is wholly indefensible, first, *because the legislature has not so limited the municipality*, and second, if it had attempted to do so, its attempt would have been void and ineffectual, *as the legislature has no such power.*

The same provision in the State and Federal Constitutions which prohibit the legislature making one kind of regulation for the municipality doing a utility business

and another kind for all others doing the same business, *just as effectually* prohibits the legislature granting the municipality rights or imposing limitations, while acting as a private corporation in the utility business, different from those it grants or imposes on all others engaged in the same business.

If the privileges or limitations granted or imposed upon municipalities while acting as a private corporation in the utility business, are sufficiently distinct to make them different from all others engaged in the same business, *then they are sufficiently distinct to be prohibited by the constitutional inhibition against special privileges and immunities.*

The lower court recognizes as indisputable that the legislature has no power to impose one kind of regulation on the utility business when conducted by a private corporation, and another kind when conducted by a city, unless there is a valid reason for such distinction, and it says:

> "The only reason which is recognized as valid is a *substantial* distinction, which *differentiates* in *important* particulars the particular person to whom it applies from all other persons, having some *reasonable* and just relation to the *purpose* of the law." (Trans. p. 45).

To meet the test which it thus lays down it takes the position:

> (1) that the legislature did by the Utilities Act prescribe that the private corporation might have

rates which would produce a reasonable profit, and did, by the Municipal Ownership Act, prescribe that municipalities should not profit "to the same extent." (Trans. pp. 45-47); and

(2) that solely because one class of operators may make a reasonable profit and the other class may not profit to the same extent, a "substantial distinction" exists, "having a reasonable relation to the "*purpose*" of the law, which justifies the classification.

It is clear that the first of these propositions can not be sustained, because it places upon the municipality when engaged, *as a private corporation*, in a purely commercial operation, a limitation of power not imposed upon the individual or *other private corporations engaged in the same business*. Upon the conceded premise "that a municipal corporation which supplies its inhabitants with light, gas or water, does so in its capacity of a private corporation, and not in the exercise of its power of local sovereignty" (Trans. p. 48), what power has the legislature to grant the right to exercise this proprietary function, with a limitation on the exercise of that right, which is not imposed on its exercise by individuals and other private corporations?

XII.

A MUNICIPALITY IS NOWHERE DENIED THE RIGHT TO A PROFIT TO THE SAME EXTENT AS A PRIVATE CORPORATION.

The basis of the lower court's last opinion in this case is to be found in its *interpretation of the Municipal*

Ownership Act as to the kind of rates which a municipality is empowered to fix. That interpretation is contained in the following language (Trans. p. 46):

> "Municipalities under the Municipal Ownership Act are *limited* in rates and charges for the product furnished by their public utilities, and can not operate them at a profit *to the same extent* as can private corporations, associations or persons owning like utilities. They are required, under the act governing them, to keep separate accounts of the moneys received from the operation of their utilities, *and such funds can not be used as revenues except to discharge their obligations and expenses in the operation of the utilities.* Their charges for such services are simply to be high enough to produce revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund sufficient to meet all outstanding bonds or certificates at maturity, issued on account of such utility. The statute does not contemplate that the rates shall be *higher or lower* than for the purpose aforesaid, no matter what effect such rates and charges may have upon other corporations or persons owning or operating public utilities."

The foregoing theory of municipal operation of public utilities is entirely new. No advocate of municipal ownership has ever contended that in the operation of a public utility the city would be denied the right to a reasonable profit on the enterprise. On the contrary it is most often contended by them that the profits from such

operation will reduce general taxes by furnishing a surplus revenue to be applied to various public improvements. The answer of the city in this case expressly avers *it has always sold electricity at a profit and during the last year such profit aggregated many thousand dollars.* (Trans. p. 17).

Not a single person appeared before the Illinois Legislature and advocated the passage of the Municipal Ownership Act, upon the theory that the granting of power to own and operate utilities would deprive the cities of the right to that reasonable profit which, from time immemorial, has been the indisputable right of a business enterprise.

At the time the Municipal Ownership Act was before the Illinois Legislature, no court had ever held that in operating a public utility the municipality had no right to a reasonable profit. On the contrary, every court that had spoken on the subject had held that a municipality could act in two capacities, one its governmental and the other its proprietary, and that when acting in its proprietary capacity it might exercise the *rights* and immunities of a private corporation, but would also be subject to its liabilities; *and one of the rights of a private corporation is a reasonable profit on its enterprise.*

Advocates of municipal ownership and the members of the General Assembly that passed the Municipal Own-

ership Act, were familiar with the municipal ownership and operation of water works, a public utility, by many cities in Illinois, in which the cities were making profits. They were familiar with the fact that no one had ever challenged the right of such cities to a reasonable profit. They were familiar with the fact that the courts, including those of Illinois, time and again, in speaking of municipally operated public utilities, had declared such operation to be a business enterprise, and had used such phrases as:

> "It is to be *governed*, in its duties and obligations, and its *rights* and obligations, by the *same* rules as those which apply to private persons or corporations doing the same class of service." (*State vs. Waseca*, 142 *N. W.*, 319.)
>
> "It stands upon the *same footing* as would any individual or body of persons." (*Bailey vs. New York*, 3 *Hill*, 531, 539.)
>
> "If this power is granted to a borough or a city, it is a special private franchise, *made as well for the private emolument and advantage of the city* as for the public good." (*So. Car. vs. U. S.*, 199 *U. S.* 437 *at* 463.)

Such was the state of common information and of *universal judicial declaration*, as to the *rights* of municipalities, which had been granted the power to own and operate public utilities, when that power was sought from the General Assembly that passed the Municipal Ownership Act of Illinois. Such common knowledge and judicial declarations can not be ignored in an endeavor to

ascertain whether the legislature intended, by the passag
of that act, to deprive cities of such an *inherent right a*
that of reasonable profit in operating public utilities i
Illinois.

(a) THERE IS NO LANGUAGE IN THE ACT ITSELF WHICH MANIFESTS ANY INTENTION TO DENY A REASONABLE PROFIT TO THE MUNICIPALITY.

In view of the fact that it has been the common cu
tom of Illinois cities operating water works to fix rat
without any limitation except that of a reasonable profi
in view of the fact that the right to a reasonable profit
such rates has never been challenged; in view of the jud
cial determination *by the Illinois Court*, and by eve
other court of the land in which the question arose, th
the grant of power to cities to operate a public utili
"was a special franchise *made as well for the priva*
emolument and advantage of the city as for the publ
good;" an intent to depart therefrom, and grant a pow
which is *not* made *as well "for the private emolument a*
advantage of the city" as for the public good, and deni
to the city a *reasonable* profit, must be evidenced by
uncertain or ambiguous language in the act.

The Illinois court, in its opinion in this case, bases i
conclusion that the legislature intended to deny citi
reasonable profit upon the language used in Sections
and 13 of the act. The court says:

"They are required, under the act governing them, to keep separate accounts of the moneys received from the operation of their utilities, *and such funds can not be used as revenues except to discharge their obligations and expenses in the operation of the utilities.*" (Trans. p. 46.)

If the legislature had prohibited cities using utility revenues for any other purpose than paying "obligations and expenses in the operation of the utilities," such prohibition might indicate an intention that reasonable profits should not be made, as, in the face of such prohibition, profits would be useless. *But the act at no place makes such prohibition.* All of the provisions of the act as to revenues are to be found in Sections 12 and 13, and in neither of these sections is a word to be found *confining* utility revenues to utility operations and obligations.

The court next says:

"Their charges for such services are *simply* to be high enough to produce a revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund sufficient to meet all outstanding bonds or certificates at maturity, issued on account of such utilities. *The statute does not contemplate that the rates shall be higher or lower than for the purpose aforesaid,* no matter what effect such rates and charges may have upon other corporations or persons owning or operating public utilities." (Trans. p. 46.)

The only provisions dealing with rates are to be found in the 12th section of the act. That section is:

> "Section 12. The charges fixed by the service rendered by it by means of any such public utility by any city *shall be high enough* to produce a revenue sufficient to bear all costs of maintenance and operation and to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity."

While municipal ownership advocates contended that municipal operation would produce profits for the city and reduce general taxes, privately owned utilities contended that if cities obtained the right to own and operate, they would, for the purpose of driving their competitors out of the field, reduce rates below the cost of operation and maintenance and make up the deficit out of general taxes. These respective contentions before the legislature, are quite as "well known by everybody who is familiar with the contest over these measures during the time they were pending in the legislature," as any other part of the history of this legislation. Obviously the only intention the legislature had, in using the language contained in Section 12, was to fix a *minimum*, below which rates could not be reduced, *and not a maximum*, above which they could not be raised.

The language, "The charges * * * *shall be high enough*," even by itself, can import nothing but a point, *below* which the city shall not go in fixing rates. The

legislature was protecting the tax payer from wrongful raids on corporate funds to make up deficits from utility operation. It was requiring that the utility should *at least* stand on its own bottom and be no burden on general taxes. It said the charges should be *high enough* to prevent the utility being a burden on general taxes, *but it did not say they should be no higher.*

It did not require legislative action to furnish a remedy against rates and that might be too high. The common law has always provided such a remedy. The evil presented to the legislature was the wrongful invasion of the corporate funds to make up deficits caused by rates that *were too low.* It was made to appear that a remedy was necessary to prevent rates that might be too low. Counsel for the city say *there is never any danger of municipal rates being too high;* that

> "Any incentive to impose upon the patrons of the utility is entirely lacking. *On the contrary,* any deviation from strict equity between the utility on the one hand and the patrons on the other *would naturally be in favor of the patrons.*" (City's petition for rehearing, p. 10.)

This, and this alone, is the deviation the legislature intended to prevent by fixing a *minimum* below which the city should not go.

In view of the universally recognized and judicially determined fact that a grant to a municipality to own and operate a public utility was "a special franchise *made as*

well for the private emolument and advantage of the city as for the public good," and that when a city engaged in such operation *it was engaging in a business enterprise*, the legislature had the right to assume that when it made such a grant in the Municipal Ownership Act, the act would be construed as being for the "*private emolument and advantage of the city*," without expressly declaring in the act itself that cities should have the right to rates that would furnish a reasonable profit.

To deny cities rates which will furnish a reasonable profit, is to deny that the right to own and operate a public utility is a special franchise, granted to the city "in its capacity of a private corporation," and made for the private emolument and advantage of the city in such capacity; on the contrary, it is to say that such right is granted to it solely as a "local sovereignty."

There are two very common phrases for expressing a *maximum*, viz:

(1) The charges "*shall not be higher than*" that necessary to accomplish a certain result; and

(2) The charges "*shall be low enough*" to accomplish a certain result.

In both expressions the meaning is plain that a *maximum* has been fixed.

Likewise, there are two very common phrases for expressing a *minimum*, viz:

(1) The charges "*shall be high enough*" to accomplish a certain result; and

(2) The charges "*shall not be lower than*" that necessary to accomplish a certain result.

In both expressions the meaning is just as plain that a *minimum* has been fixed.

It is not therefore perfectly obvious that the legislature intended to fix a minimum *and not a maximum* by the 12th section of the Municipal Ownership Act, when it provided that "The charges fixed for the service * * * shall be *high enough* to produce" a certain revenue? Did it not merely fix a point *below which* charges should not go? Measured by the language universally used by intelligent people, can it be said the legislature intended to fix a point *above which* rates should *not* go?

(b) THE EXPRESS POWERS GRANTED IMPLY THE RIGHT TO A REASONABLE PROFIT.

It was not necessary for the act to expressly authorize the city to make a reasonable profit in the operation of public utilities. The rule is well settled that municipal corporations, even in the exercise of their functions as a local sovereignty, may do those things that are "necessary or fairly *implied in, or incident* to the powers expressly granted." The main purpose of the Municipal Ownership Act as expressed in its title, is to authorize the city, in its private corporate capacity, "to acquire, construct, own and to lease or operate public utilities." Such activity, when carried on in its private corporate

capacity, has universally been regarded and characterized as a business enterprise. The right to a reasonable profit inheres, and therefore is necessarily implied, in every business enterprise.

The very first section of the act expressly grants to the city the right "to furnish and sell to private persons the products or services of such utilities." This express grant to sell implies a right to sell at a reasonable profit. Likewise in this first section the city is expressly authorized "to fix the rates and charges for the services rendered by such utilities." This express right to fix rates and charges certainly implies the right to fix *reasonable* rates and charges, and reasonable rates and charges for public utility service have universally been held to be such as will produce a reasonable return on the value of the property used, after payment of operating costs, maintenance and depreciation reserve, fair profit after payment of operating costs and maintenance.

In *Wagner vs. R. I.*, 146 *Ill.*, 139, and in *Chicago vs. N. W. Life Ins Co.*, 218 *Ill.*, 43, this court has expressly held in the case of water works operated by a municipality that the latter, being authorized by the statute to fix rates, must fix reasonable rates; and as all courts have held that a rate is not reasonable which is not high enough to produce a fair profit, it follows that even under the decisions of the Illinois Court, the municipality is entitled to a reasonable profit.

In *Wagner vs. R. I., supra,* it was contended that the unicipal water works "were not erected by the city for urposes of speculation or profit, or for deriving there-om a revenue by the sale of water to its citizens, but only r the purpose of supplying water for the use of itself d its inhabitants," and therefore that case should be stinguished from the long line of cases holding munici-l operation of utilities to be business enterprises. But ecause the statute there, as here, authorized the city to ll the utility product and fix the rates and charges, the urt said (p. 155):

> "Its power to build and maintain water works and furnish water to its inhabitants for a consideration is derived from and governed solely by the statute, and even though the intention of the city and its officers may have been to furnish water to the people of the city at the mere cost of maintaining and operating the works, and to charge no rates which would result in accumulating a surplus revenue, *the city is not bound to persist in that policy, but is at liberty at any time to abandon it and impose reasonable rates and charges, although by so doing a revenue may be realized.*"

In *Chicago vs. N. W. Ins. Co., supra,* the court said:

> "The city cannot arbitrarily establish its rates, but they must be, to a certain extent, uniform, *reasonable* and just."

Pond, in his work on Municipal Ownership, calls at-ion to the business character of the operation of a lic utility by a municipality, saying (Sec. 11):

"In its private commercial capacity while acting primarily as a business concern, the powers conferred on a municipal corporation are for its own special benefit and advantage.

* * * *

Recognizing this to be *the principal object* in the creation of such corporations and the *sole purpose* of endowing them with such commercial and proprietary powers as permit them and their citizens to enjoy of municipal public utilities, the courts permit and favor the exercise of *the fullest discretion* in the enjoyment and administration of such powers which are *consistent with the general object of their grant* and the best interests of all parties concerned who are intended to be benefited by such advantages."

One of the very cases cited with approval by the lower court, in this case, is *Butler vs. Karb*, 96 *Ohio State*, 472, in which is illustrated the great discretion which the express power to fix rates implies as to the amount of profit which may be earned. In that case the complaint was that the rates fixed by the municipality were not sufficient to produce a profit and the court there said (p. 483):

"It may be that for a time the business will not be remunerative at the rates charged, yet with proper management the business will develop to a point where it will even yield a profit and therefore result to 'its own special benefit and advantage'."

Again illustrating the great variety of implied powers which are carried with the express power granted to a city to enter upon a business enterprise, is the case of

Andrews vs. South Haven, 187 *Mich.*, 294 (*Ann Cas.* 1918B100). There the right of the city to sell lighting fixtures and install the same was challenged. The court held that while the statute authorizing the city to do a lighting business did not expressly authorize the sale of fixtures, and the installation of the same, yet such was an implied power. There the court said:

"In its operation and business management the city had the right and power to do those things *naturally connected with and belonging to the running of such a business which a private corporation would have in the same connection. Pond on Public Utilities, Sec.* 8. The power to engage in this municipal business activity for the public welfare is necessarily conferred in general terms. To go into details of administration and specify each particular thing which could or could not be done would be unwise and practically impossible. As to details and methods of conducting such authorized business, involving exercise of special knowledge and business judgment, *there must be many implied powers.* A strict, illiberal, or narrow construction which might hamper the exercise of a reasonable discretion by the municipal authorities in such matters, because the power is given in few words, is not, with perhaps a few exceptions, the tendency of decisions in most jurisdictions. The courts, as a rule, are not disposed to interfere with the management of an authorized business, conducted by the municipal authorities presumably in the interest and for the benefit of the city and its inhabitants, unless dishonesty or fraud is manifest, or the vested power which its implied discretion has been clearly exceeded or grossly abused.

* * * *

It may well be contended that furnishing to customers taking electricity the necessary devices or equipment to produce heat, power, or light from the current is naturally incidental to and an implied power connected with the business of operating an electric light plant. *It does not appear that the municipality in so doing is conducting the business by different methods or under other rules than those which are observed by and control private business corporations or private individuals in the operation of an electric plant.*"

Finally, as showing that when a city enters on such a business enterprise, it must be treated the same, and has the same implied powers, as any other private corporation, that a court says:

"And it is held that the court will not interfere with any reasonable exercise of the implied powers to operate such plants in a business way, *and as any private corporation could or would.*"

In *Torrent vs. Muskegon*, 47 *Mich.*, 115, 10 *N. W.*, 132, 41 *Am. Rep.*, 715, Justice Campbell, in writing the opinion, foreshadowed the rule which, by the great weight of authority, is applied in construing general powers to a municipality to engage in certain modern business activities for the public welfare, saying, in part:

"If cities were new inventions, it might, with some plausibility, be claimed that the terms of their charters, as expressed, must be the literal and precise limits of their powers. * * * There are many flourishing cities whose charters are very short and simple documents. Our verbose charters, except in

the limitations they impose upon municipal action, are not as judiciously framed as they might be, and create mischief by the prolixity. But if we should assume that there is nothing left to implication, we should find the longest of them too imperfect to make city action possible."

In *Henderson vs. Young*, 119 *Ky.*, 224, where the issue was the right of the city to furnish electricity to customers, beyond the city limits, the court said:

> "In the management and operation of its electric plant, a city is not exercising its governmental or legislative powers, but its business powers, *and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council;* and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters."

In the Municipal Ownership Act the only express limitation on the city, as to rates, is one that prohibits the city making rates *so low* that they will not produce sufficient revenue to pay operating expenses, maintenance, interest and principal of bonds and certificates. *As there is no express prohibition* against rates which are merely high enough to produce a reasonable profit, the express right to fix rates carries with it the right to fix them high enough to produce a reasonable profit. *This being so, the only distinction upon which the lower court justified the classification of municipal plants and privately owned plants, does not in fact exist, and the classification is invalid and void.*

(c) THE REVENUE SPECIFIED BY SECTION 12 INSURES A REASONABLE PROFIT.

Upon the lower court's own theory that Section 12 requires such rates as will produce the revenue there specified—*no more, no less*, while a rate that would produce such revenue might well be *unreasonable to the consumer*, it would, under all circumstances, provide a *reasonable profit to the owner*. A reasonable profit is produced when the gross revenue is sufficient to pay all operating expenses, maintenance and a fair return on the investment. Does not Section 12 absolutely insure *at least* such gross revenue? It provides:

> "The charges fixed for the service rendered by it by means of any such public utility by any city *shall be high enough to produce a revenue sufficient* to bear all cost of maintenance and operation *and to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity.*"

Can the court find any name for that part of the revenue which *remains to the city after* "all costs of maintenance and operation" *has been paid*, other than the name "*profit*"? Will the court say that such *remaining* revenue, sufficient not merely "to meet interest charges on bonds and certificates," but in addition thereto to pay off the whole investment in twenty years, is not

"reasonable"—at least to the owner? In other words, at the end of twenty years the city becomes the owner of a property which has been fully maintained and paid for out of rates. That is profiting *at least* "to the same extent" as other corporations.

(d) **THE LOWER COURT'S POSITION THAT THE MUNICIPAL OWNERSHIP ACT REQUIRES REASONABLE RATES IS INCONSISTENT WITH ITS POSITION THAT THE CITY MAY NOT PROFIT TO THE SAME EXTENT AS OTHER PRIVATE CORPORATIONS.**

If the revenue to be produced is absolutely fixed and unchangeable, then the only rates which can be made are such rates as will produce that specified revenue. *Under the lower court's interpretation of the Municipal Ownership Act the question of the reasonableness of rates could never arise.* The sole question at all times would simply be whether the rates fixed by the city did or did not produce the revenue specified. If the rates did not produce more than the revenue specified, the fact that such rates were unreasonable would be wholly immaterial, *for even if such rates were unreasonable, no one would have any power or authority to alter them.*

Yet to meet our proposition that the exemption of municipal plants is unconstitutional because "any legislation which attempts to relieve the city of the same burdens of regulation imposed upon private corporations or individuals engaged in like enterprise is invalid," the lower court says:

"As we have already shown, municipally owned public utilities are not exempt from regulation by the Municipal Ownership Act as to rates and charges, *and they are not exempt from the making of rates and charges that are reasonable and just and uniform for the same amount and character of service.* Under the Municipal Ownership Act the consumers are *just as completely protected from exorbitant rates and unjust discrimination* as the consumers are under the Public Utilities Act." (Trans. p. 49.)

These two inconsistent positions can not be maintained. Either the municipality is *not limited* in its rates to such as will produce the revenue described—no more no less—and can therefore make a reaosnable profit, *or it has no power to protect its consumers from unreasonable rates.*

(e) UNDER THE LOWER COURT'S INTERPRETATION OF THE MUNICIPAL OWNERSHIP ACT THE CITY CAN NOT BE REQUIRED TO FIX REASONABLE RATES.

Even if the lower court had receded from the position that the municipality has no power to fix rates *higher* than those sufficient to produce the specified revenue *there is no escape from the position* that neither the municipality, nor any court, has the power to fix or compel rates *lower* than those sufficient to produce the specified revenue.

The provisions of Section 12 of the Municipal Ownership Act do constitute a limitation, but they establish

minimum and not a maximum. There can be no question but that these provisions are mandatory as to the point *below which* rates can not be fixed. Under no circumstances can rates ever be fixed that are *not high enough* to produce the revenue specified; and if the rates fixed do not produce more than the specified revenue, *no matter how exorbitant or unreasonable they may be, the consumer has no remedy*, either by application to the municipality itself or to a court.

It is now firmly established by common consent and universal judicial determination that the charge for a public utility service must be just and reasonable, both to the consumer and to the utility. The lower court, in *Public Utilities Comm. vs. Springfield Gas Co.*, 291 *Ill.*, 209 *at* 217, said:

> "The utility is entitled to ask a fair return upon the *value* of that which it employs for public convenience, but, on the other hand, *the public is entitled to demand that no more be exacted from it than the services are reasonably worth.*"

The value upon which the utility is entitled to a fair return is the value of the property *at the time* it is being used. Under the Municipal Ownership Act the consumer can not compel the municipality to fix rates which will meet the only test of reasonableness that has been judicially declared to be proper.

No matter how unwise, wasteful or extravagant the municipality may have been in the amount paid by it for

constructing or acquiring the property; no matter how inefficient, wasteful or extravagant in its operating expenses or maintenance; the consumer *must pay* a rate which

> "shall be high enough to produce a revenue sufficient to bear all cost of maintenance or operation and to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity." (Sec. 12, M. O. Act, Post, appendix p. 67.)

Such is the kind of regulation provided for the municipality and its consumers. The municipality is not only permitted, but *it is required*, to make rates which will produce the revenue above described. Contrast that regulation with the regulation prescribed for privately owned plants, *and it at once becomes obvious that both the owners and consumers of the latter are denied the equal protection of the laws.*

The private corporation may only have a rate which will pay operating expenses, maintenance and a fair return on the present value of its property. The operating expenses it is permitted to pay out of the rate are not those which are *actually* incurred, but only those which are *properly* incurred as the result of wise and efficient management. The value of the property on which it is entitled to a fair return, is not the amount of money it *actually* paid for the property. If it was extravagant,

or wasteful, or made a poor bargain and paid more than the property is worth at the time of fixing the rate, it must bear that loss and can have a return only on its *present value*. This basis of rate making is too well established to require the citation of authorities.

Under the Municipal Ownership Act the municipal corporation *must* fix a rate which will pay operating expenses, maintenance, and *not merely a fair return* on the *present value* of its property, *but the entire cost* of the property as the bonds or certificates issued therefor mature, *and* the interest thereon during the time they are outstanding. The operating expenses it is not only permitted, *but is required*, to pay out of the rates are not merely those that are *properly* incurred as the result of wise and efficient management, but are those which have *actually* been incurred, regardless of whether the management has been efficient, wasteful or extravagant. The amount it *must* place in the sinking fund *out of the rate* is not merely the *present value* of the property, but it is the *cost* of the property, regardless of whether the city was extravagant, or wasteful, or made a poor bargain and paid more than the property is actually worth at the time of fixing the rate.

The lower court is quite right in stating that under these two acts the "rates and charges of each of these two classes of public utilities *would not and could not* be the same to consumers," (Trans. p. 46), and that the

rates a private corporation may charge under the regula
tion provided by the Public Utilities Act "are necessaril
fixed on a *different basis*" than those "fixed under th
Municipal Ownership Act," (Trans. p. 47). This bein
conceded, what justification is there for a classificatio
which *denies* to the municipal consumer the right to de
mand a reasonable rate and which *gives such right* to th
consumer of the privately operated plant? What just
fication is there in a classification which permits th
municipality to fix rates regardless of their reasonabl
ness, and requires the private corporation to fix only
reasonable rate?

The lower court concedes that

> "The only reason which is recognized as vali
> is a *substantial* distinction which differentiates i
> *important* particulars the particular person to who
> it applies from all other persons, having some *rea*
> *sonable* and *just* relation to the *purpose* of the law.
> (Trans. p. 45).

And yet the only justification offered is that the pr
vate corporation is permitted to make a reasonable profi
and the municipality is not permitted to profit "*to th*
same extent." As we have already demonstrated, th
city is not only permitted to profit to the same extent, bu
the Municipal Ownership Act *commands* it to make rat
which will produce a profit quite as great as has ever bee
held to be reasonable to any public utility owner.

XIII.

ANY ATTEMPT TO DENY THE CITY PROFITS TO THE SAME EXTENT AS GRANTED OTHER CORPORATIONS WOULD BE UNCONSTITUTIONAL.

To sustain the exemption of municipal plants the lower court was driven to the necessity of holding that the legislature has done an indefensible thing, *i. e.*, made a classification, *solely on the basis of ownership*, in the same business enterprise, giving to one the right to make reasonable profits and denying this right to the other.

We feel confident we have hereinabove demonstrated that the sole ground of distinction, upon which the lower court justifies the classification, *does not exist as a matter of fact*. We now propose to demonstrate that if the legislature had deliberately attempted to provide, by the Municipal Ownership Act, that cities as private corporations might conduct the business of furnishing electricity, but in so doing should not profit "*to the same extent*" as other private corporations doing the same business, such attempt would be unconstitutional and void.

To support its position that the legislature had in fact so provided, the lower court, of course, had to base that position on the proposition that the legislature had the power to do so. If the legislature had no such power, then even if in fact it did so, such act is ineffectual, and the result is the same as though it had not done so. The lower court says:

"Whether or not public utilities owned by municipalities shall be placed upon a different basis from public utilities owned by private corporations, associations or persons for regulation, and for fixing their rates and charges, *is a question solely for the legislature to determine*, as is also the question whether they shall be regulated and fixed by different tribunals or by the same tribunal." (Trans. p. 47.)

To sustain a difference between the two corporations, the lower court was forced to the position that the legislature has the power to prescribe one basis of profit for the municipality *when acting solely as a private corporation, and another basis for all other private corporations.* The lower court says:

"The state has the right to prescribe rates and charges by private corporations and persons for the operation of public utilities that shall produce a reasonable profit or return over and above and on their entire investment and outlay, *and, on the other hand, to limit the rates and charges of utilities owned by municipalities* so that they will only be sufficient to meet outlays and expenses of every kind by reason of their ownership and operation, as provided by the Municipal Ownership Act. It is contemplated that private corporations and persons shall realize profits. The legislature had the right to assume that the rates and charges of each of these two classes of public utilities would not and could not be the same to consumers." (Trans, p. 46).

Again the lower court says:

"The fact that it has designated municipalities as the proper bodies that shall regulate and fix the rates to be charged by utilities owned by them can furnish no cause for complaint to appellant, as the

rates that appellant may charge under the Public Utilities Act *are necessarily fixed upon a different basis,* and may or may not be the same as the rates and charges that may be fixed under the Municipal Ownership Act, even in the same city." (Trans. p. 47.)

From the foregoing it is perfectly obvious that the ver court's conclusion as to the so-called difference tifying the classification is based on the proposition t the legislature had the power to prescribe one basis profit for one private corporation (the municipality), l another and entirely distinct basis for all other pri- e corporations. In this same opinion the lower court ds:

"That a municipal corporation which supplies its inhabitants with light, gas or water, *does so in its capacity of a private corporation,* and not in the exercise of its powers of local sovereignty." (Trans. p. 48.)

Such holding is universal and no contrary opinion ts. The underlying reasoning is that the furnishing utility service is not a governmental function; that use of this indisputable fact, the city has no capacity, a local sovereignty, to accept a grant to operate a lic utility, and the legislature has no power to make grant to be exercised by it as a local sovereignty; it only accept and exercise such power as any other ate corporation might.

In granting the power to carry on such business, no distinction between these corporations can be predicated upon the fact that, *for other purposes*, one corporation is a municipality while the other is not.

It is perfectly obvious the legislature could not grant to all corporations *organized* to do *both* a gas and electric business, the right to one kind of profit in its *gas* operations, and deny that same kind of profit to all other corporations which were organized solely to do a *gas* business. That is, it could not provide one kind of profit and regulation for the gas business applicable only to a class of corporations doing that business, solely upon the ground that such class had also the power to do an electric business, and deny the same profit to and exempt from the same regulations, all companies which did only a gas business.

The question then is, has the legislature the power to grant to all corporations, organized both for purposes of local sovereignty and the utility business, the right to one kind of profit in the utility business, and deny that same kind of profit to all other corporations which are organized solely to do the utility business? The answer must be in the negative, unless it is held that in granting the right to do the same business *a distinction may be predicated upon the fact* that, for other purposes, one corporation has powers of local sovereignty. To so hold is to deny what this and every other court has steadily

adhered to, *i. e.*, that the furnishing of utility service to its inhabitants "can not in *any* sense be the performance of a governmental function." If it does not do this business "in the performance of a governmental function but does so in its capacity of a private corporation," then in the regulation of its profits *in the private corporation business*, no distinction can be predicated upon the fact that it has also, for other and separate purposes, the powers of local sovereignty.

Its powers of local sovereignty can not be intermingled with *nor permitted in any manner to affect*, its power of doing a utility business. As the court said in the *Los Angeles case*, 241 *Fed.*, 912 (affirmed Dec. 8. 1919, 251 *U. S.*, 32):

> "Whatever the city may do under the guise of the police power, it must be remembered it does in its governmental capacity. * * *
>
> Whatever the city does, however, in the matter of actually engaging in the furnishing and delivering of electrical energy to itself and its inhabitants, is done in its proprietary or quasi private capacity, (citing cases), *and the two must always be differentiated* in any attempt to define and determine *the rights* of a city in such controversy as the present.
>
> While operating in its private capacity, and considerations of necessity giving rise to an exertion of the police power *being non-existent*, as adverted to herein above, *the power of police is wanting*, and may not be exerted in furtherance of that which is merely expedient. In other words, when acting clearly with-

in the domain of its private and proprietary capacity, *the city may not draw sustenance and power to itself through an assumption of public and governmental functions.*

* * * * * *

If the engaging of the city in the business of furnishing electrical energy to itself and its inhabitants is in all respects a purely private venture as thus indicated, and if it is to be accorded the same and no other consideration than any other private venture of the same character, it would seem indubitably clear that the city, acting in its governmental capacity, would have no authority *to confer rights upon its own lighting system*, based upon and growing out of a destruction and *disregard of the rights of other systems engaged in the same business and standing in the same relation to the law.*"

If its powers of local sovereignty do not enter into, or in any manner affect, the exercise of its powers of doing the utility business, and its rights and duties in carrying on such business are identical with those of every other private corporation, *what is the distinguishing feature which justifies the legislature in denying such corporation the right to "profit to the same extent" which it grants other persons or corporations engaged in the same business?*

In granting it the power to do the utility business, the legislature has no power to prescribe a different basis of profits *because it is a municipality*, for the simple reason that its character as a private corporation *doing business*, is separate and distinct from its character as a

local sovereignty. In its character as a private corporation doing business, it is divorced entirely from its character as a local sovereignty, and it enters a field of business activity under the same circumstances and conditions as those surrounding all others doing the same business. The legislature has no power to grant it a privilege which it denies to others, nor place limitations on it which it does not place on others.

In granting the power to do a utility business and in prescribing the *extent* to which it may profit in that business, the legislature is dealing with a matter that has *absolutely no relation* to its character or powers as a local sovereignty. It can no more grant it a special privilege or impose on it a special burden in reference solely to the utility business, which it does not grant or impose on all others doing the same business, *simply because the city also has the other power of local sovereignty,* than it could grant a special privilege or impose a special burden upon other corporations in reference solely to their utility business, because they might likewise have other powers, not related to or exercised in connection with the utility business.

It is almost impossible to conceive two sets of functions and powers which are more completely divorced than those of local sovereignty and the utility business, and in which a more complete absence of relation to each other exists. Undoubtedly the legislature would

have the power to enact a law authorizing all banking corporations to acquire, construct, own and operate public utilities. There is *some* relation between banking and furnishing public utility service. They are both business enterprises. But in carrying on the utility business it would not be exercising its powers to do a banking business or be performing banking functions. Would any one contend that the legislature had the power to grant it a special privilege or impose a special burden, *in reference to its utility business*, which it did not grant to or impose upon all others doing the same business?

The mere fact that the grantee in some other capacity possesses and exercises some other powers, unconnected and unrelated to the particular powers granted would certainly not justify the legislature granting it special privileges or imposing special burdens withheld to all others not possessing the same other unconnected and unrelated powers. If this is not so then the legislature may authorize all policemen to acquire, construct, own and operate utilities, and grant them special privileges or impose upon them special burdens not imposed on others engaged in the same business, simply because in another capacity the policeman possesses and exercises the power of arrest, and the mere fact that such power is unconnected and unrelated to the utility business is immaterial.

If this court affirms the position of the lower court that a proper interpretation of Section 12 of the Municipal Ownership Act is that the legislature *intended* to prohibit a city from profiting to the same extent as any other corporation engaged in the same business, *then such section is unconstitutional and void*, and any distinction between a city and other private corporations doing utility business, based on the supposition that one may not profit to the same extent as the other, *necessarily disappears*.

XIV.

THE FACT THAT ONE OWNER MAY NOT PROFIT TO THE SAME EXTENT AS ANOTHER DOES NOT CONSTITUTE A DIFFERENCE JUSTIFYING A CLASSIFICATION.

If the legislature, by the enactment of the Municipal Ownership Act, granted to cities "a special private franchise, made as well for the private emolument and advantage of the city as for the public good," and every court in the land has so construed similar enactments; if, when any city undertakes to exercise the power so granted, "it stands on the *same footing* as would any individual or body of persons, upon whom like special franchises had been conferred," as all courts speaking on the subject have so declared; then in determining whether it should be subject to, or be exempted from, the same regulation as is provided by a general law, the fact that it is a municipal and not a private corporation must be disregarded.

In the last opinion of the lower court in this case, says:

> "That a municipal corporation which supplie its inhabitants with light, gas or water, *does so in i capacity of a private corporation* and not in the exe cise of its powers of local sovereignty." (Tran p. 48).

Then, if we are dealing with two classes of owner even under the theory of the lower court *they are bo private corporations.* Assume now that one of the classes was organized under an act of the legislatu which expressly provided that it should pay seven p cent of its gross revenues into the state treasury (as t Illinois Central Railroad Company is required to), a the other class was organized under an act that placed limitation on its profits. Both classes of corporatio are engaged in furnishing public utility service, but o may not profit *"to the same extent"* as the other. W would then have the identical situation which the low court says exists in regard to municipal and priva plants. The *business* of furnishing public utility servi requires regulation, and the legislature enacts a compr hensive regulatory law, the basic principle of which that the rates charged shall be just and reasonable. Fro such regulatory law it attempts to exempt the corpor tion which must pay seven per cent of its gross into t state treasury. It enacts another law under which it contended that corporation *may* be regulated, but und

which it can not be compelled to fix only just and reasonable rates. The providing of one kind of regulation for one and another kind of regulation for the other, is claimed to be justified on the ground that one corporation may not profit *"to the same extent"* as the other.

But why should one corporation which may not profit *"to the same extent"* as another be relieved from the same kind of regulation in carrying on the same kind of business?

All courts say there must be a substantial distinction, "having some reasonable and just relation to the *purpose* of the law." What is the "purpose" of the Utilities Act? It is to regulate the business of selling public utility service and *prevent unreasonable rates.* Admit the fact that one corporation may not profit to the same extent another may. What relation has that fact to the regulation of the business, and the prevention of unreasonable rates?

Do not all who undertake the business owe the same duties and obligations to the consumers? Can it be said that the corporation which may not profit to the same extent as another is relieved of, or does not owe, the same duties and obligations to the consumer which the other corporation does? If so what duties is it relieved of? What duties does the one owe which the other does not? In *Wigal vs. Parkersburg* (*W. Va.*), 52 *L. R. A.* (*U. S.*) 465, *at* 470, the court said:

(Copy from report as indicated).

In *Seaboard Air Line vs. Simon*, 56 *Fla.*, 545, selected as a leading case and reported in 16 *Annotated Cases*, 1234, the court says:

> (p. 551): "Where persons, or corporations engaged in the same character of business, under practically the *same legal duties and obligations*, are subjected to different restrictions or burdens, with reference to the duties and obligations of such business, and there are no legal or natural, practical and reasonable differences of a material or substantial nature *in the duties owed by them in the subject regulated*, which justify a difference in regulations of the duties and obligations, *with reference to the business engaged in by all*, the different restrictions or burdens imposed on some and not on all similarly conditioned, may operate as a deprivation of property without due process of law, and as a denial of the equal protection of the laws. See 8 Cyc., 1073."

We submit that when it is conceded, as of course it must be,

> "that a municipal corporation which supplies its inhabitants with light, gas or water, *does so in its capacity of a private corporation*,"

its act in so doing

> "must of necessity carry with it the same duty, responsibility and liabilities that are imposed upon and attach to private owners of similar enterprises." (12 Idaho, 544).

That its rates must be "reasonable, uniform and just" has been declared by the lower court, in *Chicago vs.*

Ins. Co., 218 *Ill.*, 43. That "it is subject to the same restrictions as to practices of discrimination in rates and service" is decided in *Butler vs. Karb*, 96 *Ohio St.*, 472, cited with approval by the lower court in its last opinion in this case. The Supreme Court of Minnesota, in *State vs. Waseca*, 142 *N. W.*, 319, has said:

> "It is to be governed in its duties and obligations and its right and obligations by the same rules as those which apply to private persons or corporations doing the same class of service."

Clearly, then, the Utilities Act, which requires private corporations to furnish service at reasonable rates and exempts municipal corporations from such requirement, operates as a denial of the equal protection of the laws.

XV.

THE JUDGMENT OF THE LOWER COURT IS BASED ON THE MISCONCEPTION THAT THE M. O. ACT PROVIDES GOVERNMENTAL REGULATION.

After describing the provisions of the various sections of the M. O. Act the lower court says (Trans. p. 42):

> "As will be seen from the foregoing, the Municipal Ownership Act is a complete act within itself authorizing cities to acquire, own and operate public utilities within their borders and to regulate the same and fix rates and charges as aforesaid, and the act furnishes the reason for excepting such public utilities from the jurisdiction of the Public Utilities Commission by the said provisions of Section 10 of the Public Utilities Act."

After stating the purpose of the Utilities Act the lower court says (Trans. p. 43):

"The statute, we must infer, was adopted in accordance with a plan. *State vs. Gantz*, 124 *La.* 535. This plan was that all private corporations owning and operating public utilities should be bound by all the provisions of the act, and that all municipal corporations should be excluded from the provisions of the act. Public utilities owned and operated by municipalities were to be governed and controlled by the provisions of the Municipal Ownership Act and regulated only by such municipalities."

Again the lower court says (Trans. p. 46):

"It is equally clear that the legislature had the right and power to delegate to the municipalities the right of regulation and control of such municipally owned plants. Such right is clearly recognized not only in this state but in other states. It might have given the Public Utilities Commission the right to fix the rates and charges of plants owned by municipalities in accordance with the provisions of the Municipal Ownership Act, as well as the right to regulate and fix charges for privately owned public utilities under the Public Utilities Act, had it seen fit to do so. The fact that it has designated municipalities as the proper bodies that shall regulate and fix the rates to be charged by utilities owned by them can furnish no cause for complaint to appellant, as the rates that appellant may charge under the Public Utilities Act are necessarily fixed upon a different basis and may or may not be the same as the rates and charges that may be fixed under the Municipal Ownership Act, even in the same city."

Finally the lower court says (Trans. p. 49):

"As we have already shown, municipally owned public utilities are not exempt from regulation, by the Municipal Ownership Act as to rates and charges, and they are not exempt from the making of rates and charges that are reasonable and just and uniform, for the same amount and character of service. *Under the Municipal Ownership Act the consumers are just as completely protected from exorbitant rates and unjust discrimination as the consumers are under the Public Utilities Act.*"

From the foregoing it is apparent the lower court bases its judgment on the conclusions: (1) That the legislature intended to provide governmental regulation by the M. O. Act for municipally owned utilities, and did so provide; (2) that it had the power and intended the rates and charges of municipal plants to be upon a different basis than those of other plants, and did so provide; (3) that it intended a different kind of regulation for municipally owned plants from that provided for all others, and did so provide; and (4) that notwithstanding all this:

"Under the Municipal Ownership Act the consumers are just as completely protected *from exorbitant rates and unjust discrimination* as the consumers are under the Public Utilities Act." (Trans. p. 49).

Such conclusions, we submit, are not sound. We feel confident it is clearly demonstrable: (1) that the M. O. Act does not provide governmental regulation; (2) that the legislature had no power, and did not intend, to

provide a different basis of rates for municipally owned plants from that provided for all other plants; (3) that it had no power to provide one kind of regulation for municipally owned plants and another kind for all others; (4) that the consumers of municipal plants are not as completely protected from exorbitant rates and unjust discrimination as the consumers of all other plants.

In its assumption that the M. O. Act *as completely takes care of the evils and provides the remedies* in reference to municipally owned plants, as the Utilities Act does in reference to all other plants, the *lower court has entirely overlooked* the protection which must be afforded the owners of private plants against unjust and unreasonable competition—*the foundation stone of governmental regulation.*

XVI.

THE MUNICIPAL OWNERSHIP ACT MAKES NO PROVISION FOR GOVERNMENTAL REGULATION OF CITY PLANTS.

The lower court has wholly misconceived the scope and purpose of the Utilities Act. It provides as comprehensive and scientific governmental regulation of the public utility business, as has been developed to this time by the best and most advanced thought given to the subject. Its only serious defect is the attempted exemption of municipally owned plants. *Competition* as a regulatory force had failed. The only alternative for public utilities

as *governmentally regulated monopoly.* Consumers are ntitled to adequate service at reasonable and non-dis-iminatory rates. Competition did not produce this.

The difficulty was that while competition would pro-uce low rates they were never permanent nor scien-fically constructed. A company would occupy the field nd charge what it thought the "traffic would bear." The eld would then be invaded by a rival company and a ate war would ensue. The invasion required a dupli-ation of the property necessary to serve the commun-y. Rates would be reduced far below cost of produc-on. With bankruptcy confronting both companies, the ronger would finally purchase the property of the eaker, or a consolidation of the two would be effected. ates would then return to their former level and, grad-ally, to a higher level. This was inevitable because the :viving company was loaded down with a greatly in-reased investment, necessitated by the acquisition of uplicate property, eventually scrapped, but upon which return had to be earned.

Out of this situation grew governmentally regulated *onopoly.* It finally became apparent that the very foun-ation stone of reasonable rates was a prevention of the uplication of property used in producing the service. ne of the most serious evils to be remedied was the pre-ention of investment in utility property not necessary o the service of the community. This can only be ac-

complished by *regulated monopoly*. The consumer is not concerned or affected by the personnel of the owner of the utility if he is furnished adequate service at reasonable and non-discriminatory rates. This can only be secured by prohibiting the construction of a utility until it is demonstrated that "*public convenience and necessity*" requires it. The determination of such a question must be vested in an impartial governmental tribunal, fully equipped with all the machinery necessary to a just conclusion and with power to enforce its mandates.

So in line with all comprehensive regulatory acts, the Illinois Public Utilities Act provides (Sec. 55, Post, appendix p. 45):

> "No public utility, not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this state *at the time this act goes into effect*, shall transact any business in this state *until it shall have obtained a certificate from the commission that public convenience and necessity require the transaction of such business.*
>
> Whenever, after a hearing, the commission determines that any new construction or the transaction of any business by a public utility, will promote the public convenience *and is necessary thereto* it shall have the power to issue certificates of public convenience and necessity."

No such regulation is provided for municipally owned utilities. No privately owned utility could construct a plant to serve the inhabitants of Springfield, without a certificate of the Illinois commission that public

essity and convenience require it, and the commission ıld not grant such a certificate until it was convinced t the present concern (plaintiff herein) was not fur- hing adequate service at reasonable rates. The com- sion has full power to compel the existing company to nish adequate service at reasonable rates and it would he duty of the commission so to do.

If, however, the city, operating a utility in its private porate capacity, is not subject to the jurisdiction of state commission, then it may thwart the purpose and nt of the Utilities Act to prevent a wasteful duplica- of utility investment, by constructing and operating mpeting plant in a field already occupied by a gov- mentally regulated utility. By reduction of prices w cost of operation it can bankrupt the privately ed plant and then have the field to itself, to do what it ses, being subject solely to its own regulation as to quacy of service and reasonableness of rates. This is a mere possibility, it is what is now actually occurring Springfield. Has the legislature the power to grant h a special privilege and immunity to one private cor- ation (the city in its private corporate capacity) and y it to all others? What protection has been fur- ed in the M. O. Act against this fundamental evil of -regulation?

Protection against "exorbitant rates and unjust dis- nination" is not the sole function of governmental

regulation of utilities, as the lower court seems to have assumed (Trans. p. 49). Quite as important to the consumer, is the compelling of adequate service. Recognizing this, the Utilities Act provides:

> "Sec. 32. * * * * Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and the public, and as shall be in all respects adequate, efficient, just and reasonable.
>
> * * * *
>
> Sec. 49. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed and shall fix the same by its order, decision, rule or regulation. The commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility.
>
> * * * *
>
> Sec. 54. The commission shall have power to ascertain, determine and fix for each kind of public utility suitable and convenient standard commercial units of service, product or commodity, which units

shall be lawful units for the purposes of this act; to ascertain, determine and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the performing of its service or to the furnishing of its product or commodity by any public utility, and to prescribe reasonable regulations for examining, measuring and testing such service, product or commodity, and to establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for examining, measuring, or testing such service, product or commodity.

* * * *

Sec. 57. The commission shall have power, after a hearing and upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand.

* * * *

Sec. 8. The commission shall have general supervision of all public utilities, shall inquire into

the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipments and other property owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this act and any other law, with the orders of the commission and with the charter and franchise requirements."

The foregoing provisions are quoted so that the court may see the comprehensive scope of governmental regulation that all utilities, except municipally owned, are subjected to in reference to competition and adequacy of service and management. These are only a few of the multitude of provisions contained in the act, which consists of 68 printed pages. No such regulation is provided for a municipally owned plant. Its consumers have no tribunal to appeal to for adequate service. The M. O. Act does not require adequacy of service, and naturally makes no provision for the creation of a tribunal to compel adequate service or facilities.

The Utilities Act expressly declares:

"Sec. 32. All rates or other charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any

service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful."

It then contains many sections in which the details for compelling just, reasonable and non-discriminatory rates are provided, vesting plenary powers in the commission for such purpose. The M. O. Act does not even require that the rates of municipally owned plants shall be just, reasonable or non-discriminatory, and naturally makes no provision for compelling such rates.

The kind of regulation provided in the M. O. Act is expressed in twenty-five words, which follow the granting of the *proprietary* power to acquire and operate utilities for commercial service, *and are a part of the same sentence.* Those words are

> "to fix the rates and charges for the services rendered by such public utilities; and to make all needful rules and regulations in relation thereto."

Do those words, being a part of the sentence granting a proprietary power, *create the same kind of governmental regulation* for municipal plants, as is created by the Utilities Act (consisting of 68 printed pages) for all other plants? Obviously it is the grant of the proprietary power of internal regulation, the same as that granted all private corporations to make rules, regula-

tions and by-laws. The grant of the power "to fix rates and charges" is the power to fix *initial rates*, appearing in many private charters, and never construed as a surrender by the state of its sovereign power to regulate such rates.

(a) THERE ARE TWO KINDS OF REGULATION: PROPRIETARY AND GOVERNMENTAL.

No better illustration of the existence of the two kinds of regulation could be conceived than that presented by the 68 printed pages of the Utilities Act and the 25 words above quoted, appearing in the M. O. Act. The Utilities Act as indicated by its title, "An Act to Provide for the Regulation of Public Utilities," is an example of the most comprehensive governmental regulation of the utility business, creating a tribunal with plenary powers to enforce its mandates. The M. O. Act as indicated by its title, "An Act to Authorize Cities to Acquire, Construct, Own and to Lease or Operate Public Utilities and to Provide Means Therefor" is a charter granting proprietary powers to municipalities, and among the proprietary powers so granted, and as a part of a single sentence so granting them, is to be found the proprietary power to fix the initial rates and charges and to make the necessary rules and regulations for the internal management of the business.

The furnishing of a utility product for general consumption by the public is usually carried on upon a large

scale and must necessarily be done in an orderly manner. This requires rules and regulations *having no reference to the protection of the rights of the consumers.* A marked distinction exists between rules and regulations provided for the protection of the consumers and those provided for the benefit of the owner in the *management* of the business. As the court said in *I. C. C. vs. Railway Company,* 209 *U. S.* 108, *at* 118:

> "It must be remembered that railroads are the private properties of their owners; that while from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and commodities, *yet in no proper sense is the public a general manager.*"

The fact that regulation is necessary to the management of such a business is well recognized. *Wyman on Public Service Corporations,* at *Section* 861, says:

> "The regulating power that is possessed by those who conduct a public employment *is part of that right of management of their business* which the law concedes to remain in them. Proper regulations may be made at each stage of the hierarchy of the administration by the officer in authority."

(b) THE REGULATION PROVIDED BY THE MUNICIPAL OWNERSHIP ACT IS PURELY PROPRIETARY.

The granting of the powers, enumerated in Section 1 of the M. O. Act is simply tantamount to the charter of a private corporation erected for the purpose of doing a

utility business. This section grants to municipalities a new function, proprietary solely, which they had not before. It merely creates a new private corporation granting to it the same (and no other) *initial* powers, with reference to the price of its commodity, and to the making of rules and regulations pertaining to the "*management* of its business," which are primarily inherent in all business corporations. It does not, and cannot be construed to, grant the radically different governmental function of becoming the *final arbiter of the reasonableness of the price* for its commodity, which it may, in the first instance fix, nor of the proprietary of its practices as to furnishing adequate service without discrimination.

In *Beale and Wyman on Railroad Rate Regulations, at Section* 1326, it is said:

> "The ordinary clauses in railroad charters do not constitute a contract by the state not to regulate rates. Thus no such contract is created either by the grant of power to carry persons and property, or by the power to make by-laws, rules and regulations, or by the power to fix, regulate and receive the tolls and charges. *This is merely conferring on the corporation the powers that an individual carrier would have, and it leaves the corporation, like the individual carrier, subject to the regulation of the state.*"

It goes without saying, that the legislature had power to grant to municipalities the right to become *quo ad hoc*, private corporations, and in the act making the grant to give them *all the powers of other private*

corporations, dealing in the same commodity. This the legislature did by the M. O. Act, *but it did no more, and had no power to do more.*

Since the adoption of the Illinois Constitution of 1870, prohibiting the granting of special franchises and immunities, the legislature could no more vest in this new *private* corporation, authorized to operate commercial utilities, an *immutable* contract right to be the final arbiter of its charges, exempt from general regulatory statutes, while denying this right to all other private corporations engaged in the same business.

The M. O. Act simply grants to municipalities the same power with reference to charges that is granted to all other private corporations, *i e.*, the power to establish an initial *asking price*, which power is subordinate to the legislative power to create a commission which shall regulate the *permissible selling price.*

In discussing a clause in the Wisconsin Railroad Act, granting power to railroad corporations to *fix* rates, in *Manitowoc vs. M. & N. Tract. Co.*, 129 *N. W.* 925, *Loc. Cit.* 930, the court said:

> "It would be unreasonable to hold that by enacting Section 1862 or Section 1863, St. 1898, the state intended to *surrender its governmental power of fixing rates.* That power was only suspended until such time as the state saw fit to act."

The effect of the language "to fix the rates and charges for the services rendered by such public utilities; and to make all needful rules and regulations in relation thereto," assumed by the lower court to constitute the granting of a governmental power, was finally determined by this court to be the right to fix reasonable rates, charges, rules and regulations subject to the continued exercise by the state of governmental regulation. In the *Railroad Commission cases*, 116 *U. S., at* 330, the case turned on the following language appearing in the statute creating the Railroad Company: "that it shall be lawful for the company * * * * from time to time, to fix, regulate and receive the toll and charges by them to be received for transportation," etc. It was there contended that this power would have been implied from the rest of the charter if there had been no such express provision, and that unless it had been intended to surrender the power of governmental regulation this language would not have been inserted. The court there said:

> "The argument concedes that the power of the company under this section is limited by the rule of the common law which requires all charges to be reasonable. In *Munn vs. Illinois and Chicago, Burlington & Quincy R. R. Co. vs. Iowa*, this court decided that as to natural persons and corporations subject to legislative control, the state could, in cases like this, fix a maximum beyond which any charge would be unreasonable; and that such maximum

when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by Section 12 the state has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. *Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the state had in the matter before the charter, it retained afterwards.* The power to charge being coupled with the condition that the charges shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. *The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered.* If there had been an intention of surrendering this power it would have been easy to say so. Not having said so, *the conclusive presumption is there was no such intention.*"

The same question again arose in *Southern Ry. vs. Campbell*, 230 *U. S.* 537, and the court there again said, at page 550:

"The sole question presented on this branch of the case, it is said by counsel for the appellants, 'is whether the judgment of the carrier in fixing rates for transportation of persons or property shall be supervised, regulated, and supplanted by the judgment of the state exercised through a railroad com-

> mission, or shall it remain as it was at common law, within the exclusive power and jurisdiction of the carrier to fix these rates, subject only to the power of the courts, upon judicial inquiry, to denounce and decline to enforce rates that are excessive and unreasonable.'
>
> As to this question, it is sufficient to say that it is well established that a general charter provision such as the one quoted, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable, and does not detract from the power of the state through its legislature, or the agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier."

Hence, the M. O. Act, being the *proprietary charter* of municipalities granting merely the power to *fix*, and containing no express grant of power to determine what shall be reasonable, it is conclusively presumed that when the legislature passed that act, it merely vested the ordinary power of a private corporation in the municipality, and did not *by that act*, surrender the paramount power of "declaring what shall be deemed reasonable."

In other words, in this respect as in all others, the M. O. Act left the municipalities with the powers and functions of a private corporation, and no others. It neither granted, nor sought to grant in conneciton with the ordinary functions of private corporations, the additional *governmental power* of "declaring what shall be deemed reasonable." Therefore, there can not be found

in the M. O. Act, any expressions which justify the assumption by the court,

> "That it" (the legislature) "has designated municipalities as the proper bodies that shall regulate and fix the rates to be charged by utilities owned by them." (Trans. p. 47).

All that can be inferred from the M. O. Act is that the legislature gave thereby to municipal corporations, a proprietary franchise, to be exercised by them upon the same basis of its exercise by a private corporation—namely, to sell electricity, and to fix *reasonable* charges therefor, but the power to determine (subject to review by the judiciary) what are reasonable charges was still left in the legislature, to be exercised by it or by any agency to which it might *see* fit to delegate it *by a constitutional exercise* of its authority.

(c) TO CONSTRUE THE REGULATION AS GOVERNMENTAL, RENDERS IT UNCONSTITUTIONAL.

To hold that when the M. O. Act bestows the new function and character of a private corporation on the municipality,

> "to acquire, construct, own and to lease or operate public utilities and to provide the means therefor," (title of the M. O. Act),

it does more than grant the initial right to fix the tentative price of its commodity and to make the necessary rules and regulations as to the "*management of its business,*" is to hold the last clause of the first section of the

act invalid as effecting a *grant of power not expressed in the title.* This is so because the title is solely concerned with the vesting of a *proprietary* function and *discloses no intent* to grant a *governmental* power. To construe Section 1 as granting the *governmental* power of regulation (as contra-distinguished from the *proprietary* power of fixing the initial price of its commodity and making needful rules and regulations as to the "*management of its business*"), would be the incorporation in the act of a subject not expressed in the title.

Section 13 of Art. IV of the Illinois Constitution provides:

> "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; * * * *"

After granting the proprietary power, there is found in Section 1 of the M. O. Act a grant of power "to fix rates and charges for the service rendered by such public utilities; and to make all needful rules and regulations in relation thereto." It is this second grant of power that the Supreme Court of Illinois says provides as comprehensive governmental regulation of municipally owned utilities as the Public Utilities Act provides for all other utilities. This cannot be under the Illinois Supreme Court's own application of Section 13 of Article IV of the Illinois Constitution to a similar act of the legislature.

The grant of a power of *governmental* regulation is not related to the grant of a *proprietary* power to carry on a commercial business, and the expression of the latter in the title of the act is not an expression of the former, as required by the constitution. While they are both related to the general powers of cities they are "not related to each other in fact or in any theory of the law." In *Sutter vs. Peoples Gas Co.*, 284 *Ills.* 634, the legislature attempted to include in one act these two powers, one proprietary, that of selling electricity, and the other governmental, that of regulating prices for electricity. The court held the act void as in violation of this same section of the constitution prohibiting more than one subject in the same act, saying (p. 645):

> "The two subjects in the act and title were related to the general subject of the powers of a municipality, but they were not related to each other in fact or in any theory of the law. The sale of surplus electricity was authority to exercise private, *proprietary* power of the city within the established rule that where legislative authority is given such a business as furnishing electricity, being impressed with a public use, may be carried on by a city. (*Wagner vs. City of Rock Island*, 146 *Ills.* 139; *City of Joliet vs. Alexander*, 194 *id.* 457; *City of Chicago, Town of Cicero*, 210 *id.* 290). The authority to regulate the rates at which gas or electricity may be furnished by a public utility is an exercise of the legislative, political and *governmental* power of the municipality, and the two subjects of sale by the city and regulation of sales by individuals, companies or

> corporations, are not in any manner related, akin or otherwise connected, except in the fact that gas and electricity are to some extent, at least, applied to the same uses. *The act was a clear and palpable violation of the constitutional provision* that no act shall embrace more than one subject, which shall be embraced in the title, and that being so, other questions relating to the method of its passage or the manner of its submission to the electors of the city are immaterial."

Under the foregoing decision of the Illinois Supreme Court, if the second grant of power contained in Section 1 of the M. O. Act is the grant of governmental regulation then so much of that act is unconstitutional and void, *and does not exist as a premise for the conclusion* that the M. O. Act furnishes as adequate protection by governmental regulation for municipal patrons as is furnished by the Public Utilities Act for the patrons of all other utilities.

XVII.

THE UNCONSTITUTIONALITY OF SECTION 10 DOES NOT RENDER THE WHOLE UTILITIES ACT VOID.

The lower court takes the position that if Section 10 is unconstitutional, the entire act must be held invalid, because it says the act without the exemption of municipal plants would cause results not contemplated or desired by the legislature (Trans. p. 43). It entirely disregards and gives no effect to Section 83 because it says its enforcement would practically nullify the Municipal

Ownership Act (Trans. p. 44). The court's opinion that the elimination of Section 10 would cause results not contemplated or desired by the legislature is based on conclusions which it draws from the "history of the legislature," *viz*: that an attempt was made to regulate all public utilities by a state commission; that opposed to this was an attempt to regulate each public utility by the municipality in which it was located; that a compromise was effected by which municipalities were granted the right to own and operate utilities and regulate the same, and all other utilities were to be regulated by the state commission (Trans. p. 44).

(a) SECTION 83 IS ONE OF THE MOST IMPORTANT AND CONTROLLING FACTS IN THE "HISTORY OF THE LEGISLATION."

The lower court erred in failing to consider Section 83 as a part of the history of the legislation, and in emphasizing the fact that there were two factions, one desiring regulation by a state commission and the other desiring regulation by municipalities. In all important legislation there will be found marked differences of opinion, the various factions contesting for supremacy, and finally a compromise. The fact that a particular compromise was reached is no justification for the conclusion that no other compromise would or could have been reached, if the legislature had then known that the compromise reached included an unconstitutional provision.

When the history of the legislation shows one faction insisting upon the inclusion of a certain exemption, and the other faction consenting thereto, *but only upon the express condition* that:

> "If any section, sub-division, sentence or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act (Section 83 of the Utilities Act),"

it is perfectly obvious that the whole legislature finally agreed and intended that the comprehensive regulation of utilities as provided by the act should not fall by reason of the inclusion of that exemption. This conclusively shows the final agreement of the legislature was that the exemption should be made if it did not violate any constitutional inhibition, *but if it did violate the constitution the act, without it, shall remain in force.*

Section 83 is the most important and controlling fact in the history of the legislation because it is the *legislature's own unequivocal statement* of the *condition upon which* the exemption of municipal plants was tacked on to the Utilities Act.

No one will deny the existence of a nation wide demand for comprehensive governmental regulation of public utilities at the time of the passage of the Illinois Act. That the legislature recognized its duty to comply with this demand is manifested by the voluminous detail covering every phase of regulation, which it provided for

in the Utilities Act. There is a compelling presumption that a legislature desires to conform to the constitution in enacting laws. In view of this demand, the legislature's manifest intent to comply with it in the most comprehensive and approved manner, and its desire to conform to the constitution, is it a reasonable presumption that the legislature would have abandoned such regulatory legislation when it was convinced it could not constitutionally exempt municipal plants? The very fact that it agreed to exempt municipalities only upon the condition that, if any section of the act was held unconstitutional, the balance of the act should remain in force, shows conclusively it considered the regulation of utilities to be all important.

There is no escape from this conclusion even if, as the lower court suggets, the Utilities and Municipal Ownership Acts be considered and treated as twin measures. The main purpose of the Municipal Ownership Act is to grant to cities, in their proprietary capacity, a power they did not then possess, *i. e.*, of constructing, acquiring, owning and operating commercial plants. With the exception of three lines, that act is devoted to providing the details of constructing, acquiring, owning and operating commercial plants. It makes absolutely no provision for the principles that shall control, nor any details of administration for, *governmental* regulation of municipal plants. After authorizing cities to construct,

own and operate commercial plants, it provides, as one o
the details of, and as incident to, that *proprietary* powe
the right "to fix the rates and charges for the servic
rendered by such public utilities; and to make all nece
ful rules and regulations in relation thereto." Not a
other word on the subject of any kind of regulation wi
be found in the whole act. Obviously, the legislature wa
not intending to provide in that one act, a grant of th
proprietary power to acquire, own and operate a com
mercial, and the kind of *governmental* regulation, whic
it recognized to be necessary in the Utilities Act.

Considered as twin measures then, the legislatu
was dealing with the subjects of granting proprietar
power to cities and the governmental regulation of a
public utilities. One faction was contending for the in
clusion of all utilities under the comprehensive gover
mental regulation provided by the Utilities Act, and th
other faction contending that municipal plants should b
exempted from that kind of regulation and subjecte
only to the kind of regulation provided in the Municip
Ownership Act. Assume then that the compromise a
fected, was affected in relation to both these subject
The result is the same, *i. e.*, that municipal plants shou
be granted the power to own and operate plants and b
exempted from the regulation provided in the Utilitie
Act, but only on the condition, that if such exemptio
was held unconstitutional it should not affect the validi

of the act as a whole. In this connection it is most significant that no section was inserted in the Municipal Ownership Act, providing that if any clause of that act be held unconstitutional, it should not affect the balance of the act, thus showing that the legislature deemed the comprehensive governmental regulation of utilities provided in the Utilities Act, to be the most important of these subjects, and the one to be carefully guarded and protected.

(b) IF SECTION 10 IS IN FACT SEPARABLE, THEN THE INTENT MANIFESTED BY SECTION 83 IS CONTROLLING ON THE COURTS.

When a court determines some provision of an act to be unconstitutional, it must next determine whether it is separable and independent, for unless it is, the whole act must be held void. Even if it determines the provision to be separable and independent, it must then determine whether the elimination of the separable provision would leave a law the lgislature did not "contemplate or desire." The act might contain a provision that was unquestionably separable, but if the legislature would not have passed the constitutional parts without the separable unconstitutional part, the whole act must fall, otherwise a law will be created which the legislature did not contemplate or desire.

In determining the first question, *i e.*, the separability of the provision, consideration can be given only to the

inherent qualities of the invalid provision to ascertain whether it constitutes the main purpose of the act, or whether it is actually necessary to the carrying out of the main purpose. This is solely a judicial and not a legislative question.

In determining the second question, *i. e.*, whether the elimination of the separable portion would leave a law the legislature "did not contemplate or desire," the court is dealing solely with the *intention* of the legislature. This is a matter about which the legislature is supreme and has the right to speak, *and when it does speak no court has the right to deny what it declares its intention to be.*

Taking up now the first question, *i. e.*, the separability of the provision exempting municipal plants, it will be found the authorities are all agreed, as announced in 36 *Cyc.*, 977:

> "The whole statute will be declared invalid where the constitutional or unconstitutional provisions are so *connected* and *inter-dependent* in such matter, meaning and purpose that it cannot be *presumed* that the legislature would have passed one without the other."

From the foregoing proper announcement of the rule it is to be seen that it is a question of *presumption* arising out of a determination of the *fact* whether "the constitutional and unconstitutional provisions are so *connected* and *inter-dependent* in such matter, meaning

and purpose." *Unless they are so connected and interdependent* the court *cannot presume* that the legislature *would not* have passed one without the other.

Is it not apparent that the main purpose of the Utilities Act is to comply with that universal and insistent demand for a comprehensive governmental regulation of utilities? Is it not likewise just as apparent that the exemption of municipalities is "a thing apart from the structure of the statute itself"; that the statute remains "complete and purposeful without it"; and that the exemption is not necessary to the accomplishment of the main purpose, *i. e.*, governmental regulation of utilities?

In *Dupee vs. Swigart*, 127 *Ills.* 494, the validity of the act regulating the banking business was involved. The legislature attempted to exempt all banks located in cities having a population of more than 10,000 inhabitants, which the court held to be unconstitutional, saying:

> "By the first clause of Section 11, the privilege of doing a certain kind of business is subjected to conditions which have no other basis than the mere accident of residence; men, who live in a place of a certain size, are permitted to organize a banking corporation if they comply with certain terms, while men, who live in a place of different size may so organize without the imposition of any terms. This is special legislation of a most serious and unjust character."

In that case the contention was also made that if the court held that part of the act unconstitutional, the whole act must fall. But the court rejected such contention and found the invalid portion of the act to be independent of the other provisions. In that case the court did not presume that the legislature would not have passed the act if it could not make the distinction, based upon the mere population of cities. It was just as obvious there that the legislature intended to pass an act with such a distinction in it, as it is that the legislature in this case intended to pass an act exempting municipal plants. That was an act regulating the banking business. The Utilities Act is one regulating the utility business. In both cases the regulation of a business was the main purpose of the act and the exemption was not necessary to such main purpose. In both cases it is very clear from the contemporary history, that the act in its final form, was a compromise growing out of a spirited contest between factions representing entirely different theories of regulation.

In *Myers vs. The People*, 67 *Ill.* 503, the validity of an act to increase the jurisdiction of county courts was involved. The first section of the act made it apply to all county courts, but the last section exempted counties having 100,000 population. That is the exact situation in the Utilities Act, the 8th section of which provides that the State Commission shall have general super-

vision of all public utilities and the 10th section excepts therefrom any public utility owned by a municipality. In that case the court did not hesitate to hold the exemption invalid, without invalidating the whole act, saying (p. 508):

> "But, when we look at the first section, we find that, by its very terms, it extends alike to all the county courts of the state. By rejecting the last section, the remaining parts of the statute, with an exception we shall hereafter notice, are not only constitutional but complete in themselves, and capable of execution.
>
> It is a general rule, and one founded in good sense, that, if one part of a statute be unconstitutional, but it stands so independently by itself that it may be rejected, and yet leave that which remains so complete in itself as to be fully capable of execution, then the act should be construed the same as if the void part had never been inserted.
>
> Under these rules, we hold that we are at liberty to reject the last section of the act, and then, *by the terms of the first section, it will apply to all the county courts in the state.*"

In the case of *Peoples vs. Olson,* 222 *Ill.* 117, the validity of an act providing for the salaries of judges and state's attorneys was involved. The court held that while that portion of the act providing for the salary of the state's attorney was unconstitutional, that did not invalidate the balance of the act. It might just as well be said that the legislature did not intend to change the salaries of the judges without changing those of the

state's attorneys, as that the legislature did not intend to provide regulation for public utilities without exempting therefrom municipal plants. Undoubtedly the advocates of the states attorneys' salaries were just as insistent that that part of the act pass as were the advocates of the exemption of municipal plants in the case at bar. And undoubtedly the act as a whole was the result of a compromise growing out of a spirited contest.

In *Witter vs. County Commissioners*, 256 *Ill.* 616, the court did not hesitate to reject the proviso of the Juvenile Court Act without holding the whole act invalid. That proviso exempted counties having population of over 500,000 and the court there said:

> "When the invalid portion of the proviso is rejected there remains a complete and valid statute, applicable to the whole state, by which probation officers are appointed by the court to hold office during the pleasure of the court, and the act, as a whole, is not affected."

In that case it might just as well be contended that the legislature would not have passed that act if it could not exempt Cook county. Undoubtedly, the legislature there intended to exempt Cook county just as much as the legislature in the Utilities Act intended to exempt municipalities. Yet the court there did not consider it a reasonable conclusion to presume the legislature in that case would not have passed the act if it had known it could not exempt Cook county. Undoubtedly that act as

a whole was the result of a compromise growing out of a spirited contest, waged on one side by those who insisted the act should be state wide, and on the other side by those who insisted on the exemption of Cook county.

There has developed in many states of the Union, a legislative situation which is quite analogous to that now presented to the court in the various statutes with reference to the prohibition of the sale of intoxicating liquor. In a great many of these statutes, the legislature attempted to exempt from the operation of the act wines and ciders manufactured from the products of the state itself, and in every instance these exemptions have been held to be unconstitutional and invalid as being in violation of the congressional control of interstate commerce.

Nevertheless, in every instance where a prohibition statute has been attacked and the whole act sought to be invalidated because of the inclusion of this unconstitutional exemption, the courts have held that the provision was separable, and that it should be held invalid without affecting the legality and constitutionality of the rest of the statute. (Brief ante, p. 29.)

In *Com. vs. DeSarto*, 62 *Pa. Super.* 184, the court held that the invalidity of a proviso *exempting a certain class of persons* from the operation of a statute, will not destroy the integrity of the entire statute.

In *Wood vs. Philadelphia*, 46 *Pa. Super. Ct.* 573, fol
lowed in *Com. vs. DeSarto*, 62 *Pa. Super. Ct.* 184, a
elaborate civil service act was under consideratio
which contained an exemption of honorably discharge
soldiers. The exemption was held unconstitutional a
creating an invalid class distinction, and the court wa
urged to hold the whole act void, upon the argument tha
without the exemption the legislature would not hav
passed the act. The court refused to so hold, saying

> "Viewing the statute, as we do, as a highly im
> portant piece of legislation, we would be doing a
> unwarranted act if we were to attempt to expunge
> from the statute books because the mandate of th
> constitution has forced us to lop off the objectionab
> proviso.
>
> In such a case, the court may not presume tha
> the legislature would have declined to enact the la
> without the proviso. The most that can be certainl
> said is that the legislature *has expressed a willing*
> *ness to exempt from the burdens placed upon a*
> *other applicants, the special class described in th*
> *language of the proviso.*
>
> *But the latter is, in substance, so much a thin*
> *apart from the structure of the statute itself, an*
> *the latter remains so complete and purposeful wit*
> *out it,* that notwithstanding the unconstitutionalit
> of the proviso, the statute remains effective and ad
> quate to carry out the plainly expressed legislativ
> intent."

In *State vs. Baker (Ohio)* 44, *N. E.* 516, there was a
act classifying cities for certain purposes, by populatio

It was admitted that classification by population was a constitutional method, but the act was attacked on the ground that an exemption of certain cities which was conceded to be unconstitutional, invalidated the whole act. The court held that the invalidity of the exemption did not affect the validity of the remainder of the act, saying:

> "Nor can we infer, that, if the legislature had known that the exception could not have been made, the act, without the exception would not have been adopted. *We should rather infer that, in the judgment of the legislature, there was a necessity for such a class, superior to its creation with an exception of third grade 'A,' and it made the exception in a mistaken apprehension as to its powers.*"

Coming now to a determination of the second question, *i. e.*, whether the elimination of the exemption of municipal plants will leave a law the legislature did not contemplate or desire, we submit that the exemption being separable and not necessary to the main purpose of the act, the legislature is supreme, *and when it does speak no court has the right to deny what the legislature declares its intention to be.*

To avoid giving effect to the plain and unambiguous language of Section 83, the lower court says, (Trans. p. 43):

> "We cannot agree with appellant's contention that the saving clause in Section 83 of the act will justify this court in holding invalid Section 10 with-

> out affecting the act as a whole. Said Section 83 was not intended to nullify any rule of statutory construction and must receive a construction consistent with the rules of constitutional law. While this section may be some indication of legislative intention, yet, in construing it we must give due consideration to the rules heretofore laid down by this court in the interpretation of statutes. (*State vs. Bancroft*, 148 *Wis.* 124). We cannot under such rules ignore the fact that the enforcement of this section to the letter would not only nullify the exceptions in Section 10, aforesaid, but would practically nullify the whole of the Municipal Ownership Act."

To hold that Section 83 is conclusive of the intent of the legislature, on the question as to whether it would have passed the Utilities Act without the exemption of municipal plants, *if it had known such exemption was unconstitutional*, is in no sense nullifying any "rule of statutory construction," nor is it inconsistent with the rules of constitutional law. Neither would giving full force and effect to Section 83 "practically nullify the whole of the Municipal Ownership Act."

The main, if not the sole, object of the Municipal Ownership Act is "to authorize cities to acquire, construct, own, and to lease or operate public utilities, and to provide the means therefor" (the words quoted being the title of the act). By this act municipalities were granted a *proprietary* power, to be exercised solely in their proprietary capacity, which they did not theretofore possess. (*Ladd vs. Jones*, 61 *Ills. App.* 584; *Pales-*

tine vs. Siler, 225 *Ills.* 630, *at* 636). The power granted by this act to "fix rates" and make "needful rules and regulations" is proprietary, and incidental to the main proprietary power granted; it can not be construed as the *governmental* power of regulation, without violating the Illinois Constitution inhibiting an act embracing more than one subject, or granting a power not expressed in the title (*Sutter vs. Peoples Gas Co.*, 284 *Ills.* 634).

Bringing municipally owned utilities under the *governmental* regulation provided by the Utilities Act can, therefore, in no sense "practically nullify the whole of the Municipal Ownership Act," since that act can not be construed as granting any other than the *proprietary* power of owning and operating a private business, impressed with a public interest, and that proprietary power may be fully exercised with the business under the governmental regulation provided in the Utilities Act.

Twelve cases can be found in which the courts had to deal with such an express declaration as is found in Section 83 of the Utilities Act. (This brief ante, p. 29). One of these cases, *State vs. Bancroft*, 148 *Wis.* 124, is cited by the lower court in support of its position that such declaration can be ignored. Of these twelve adjudications only this one has so treated an express declaration of legislative intent. In relying on it and disregarding all the others the lower court entirely overlooked the

marked distinction between the language used to expres
legislative intent in that case and the language of Sectio
83. Apparently it also overlooked the marked distinctio
between the facts in these two cases.

To understand the difference between Section 83 o
the Public Utilities Act and the section there considere
by that court, it is necessary to set out at length the Wis
consin section. It is as follows:

> "Sections 1596-72 It is the intention of the leg
> islature that Sections 1596-1, 1596-2, 1596-3, 1596-2
> and 1596-73 of this act *be construed* to be separabl
> or independent portions thereof, and that any one o
> all of said sections may fail or be declared invali
> without affecting any other section or sections of th
> act; and it is further the intention of the legislatur
> that if any other separable or independent portio
> of this act not necessary for the accomplishment o
> the main purposes sought to be accomplished thereb
> fails, the remainder of said act shall not be affecte
> by the failure of such separable or independent por
> tion of said act."

The language used in the Wisconsin Statute widel
differs from that used in Section 83. In the former ther
is a mere declaration that it is the intention of the legis
lature that five certain sections "*be construed*" to b
separable portions, and that *if* any other sections *ar*
separable and *not necessary* for the accomplishment o
the main purpose of the act, the remainder of the ac
shall not be affected by the failure of such other section

which are in fact, separable. Such language still left it to the court to determine whether, *as a matter of fact,* and not as a matter of intention, the five specified sections and any others were "necessary for the accomplishment of the main purposes."

Upon an examination of the act the court found the five sections constituted the main purpose of the act, and when they were eliminated nothing was left but detailed administrative provisions with nothing to which they could be applied. The declaration of the legislature amounted to an "extreme case of palpable absurdity or falsity." After describing what the main purpose of the act was, the Wisconsin court said:

> "Section 1596 is not necessary to the accomplishment of this main purpose (the act was an act to amend Section 1596 and the original Section 1596 was not involved in the case), but all the rest of the act appears to be. * * * * There is nothing left but a confused detail of incoherent provisions. * * * * When a legislative enactment has an all prevading purpose, coupled with minor details and administrative features, and this purpose is unconstitutional, such minor details and administrative features cannot survive condemnation of the main purpose."

In the earlier case of *Borgnis vs. Falk*, 147 *Wis.* 327, the Wisconsin court had said:

> "We may say in passing that we know of no good reason why the legislature may not declare its intention that one part or section of a law is not a

compensation for, and that it may be separated f
the balance of the act for the very purpose of sa
such balance from being invalidated in case the
named part or section be held unconstitutional.
think it would take a very extreme case of palp
absurdity or falsity in such a provision, to ju
any court in declaring such a declaration of leg
tive intent ineffective, *if indeed a court could*
such a declaration at all."

Whether a portion is separable or independent
question of fact, not a question of intention. A leg
ture can not make a certain portion separable or i
pendent by merely stating that it intends it so t
If it is not such in fact, mere intention can not make i
In the *Bancroft case*, *supra*, the court very properly
regarded the language of the legislature when it fo
as a fact, that the specified portions of the act were n
sary to the accomplishment of the main purpose.
that when those portions were eliminated nothing
left "but a confused detail of incoherent provisions.

The lower court supports its action in disregar
Section 83 solely upon the authority of the *Bancroft*
It ignores the distinction between the language of
act and of the Utilities Act. It ignores the distin
between the facts of that case and the facts of this
If this court will apply the test used in the *Bancroft*
it will find that the main purpose of the Utilities A
the regulation of public utilities; that the exemptio
municipal plants was not the *main* purpose; that suc

emption is not necessary to the accomplishment of the main purpose; that when such exemption is eliminated a complete and purposeful act remains, and not merely a "confused detail of incoherent provisions."

The lower court apparently overlooked the cases of *State vs. Clausen*, 65 *Wash.*, 156; *Am. Exp. Co. vs. Beer*, 107 *Miss.*, 528; *Saari vs. Gleason*, 148 *N. W.* (*Minn.*), 203, and the eight other cases hereinabove cited. (Ante p. 29.) It made no attempt to distinguish them from the case at bar. It does not even mention them. Yet in all of these cases there were provisions identical with Section 83. Those courts, passing upon language identical with Section 83, held that such language manifested the legislative intent and that the court was bound to give effect to the intent so expressed. Speaking of the provision, the court in the *Clausen case, supra*, said:

> "*This means that the legislature intended the act to be enforced as far as it may be, even though it might not be valid in its entirety.* It was competent for the legislature so to provide. Anything it could have eliminated itself and left an operative act can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination."

Will this court say that the Illinois Legislature could not have eliminated the exemption in Section 10?

In *Amer. Ex. Co. vs. Beer, supra*, the court said:

> "*We are relieved in the case at bar from any doubt as to whether the legislature would have enacted sections of the statute herein questioned independently of the resident thereof,* for the reason that it is expressly provided by Section 18 of the act, that (here follows language identical with Section 83 of the Utilities Act)."

In *Saari vs. Gleason, supra,* the court, after quoting language practically identical with Section 83 of the Utilities Act, said:

> "Effect must be given to this section. Courts have sometimes declared a whole statute void on account of the invaliding of a part, but in all such cases it has been on the ground that the valid and the invalid parts are so interdependent and so connected in subject-matter and purpose *that it can not be presumed* the legislature would have passed the one without the other. It is a case of giving effect to the legislative intent. (Citing cases). *But where the legislature in plain terms expresses an intent that all portions of the act not in themselves invalid shall stand,* and that the act shall be enforced, as far as may be, even though it may not be valid, in its entirety, *the reason of the rule no longer exists and the rule itself fails. The court must give effect to the legislative intent so expressed.* We know of no good reason why the legislature may not declare its intention that one part of a law may be separated from the balance for the very purpose of saving the unobjectionable parts from being declared unconstitutional."

In the *Schuler case*, 167 *Cal.* 282, the court said that conceding that one section of the act was void, it would be compelled, nevertheless, to uphold the balance,

> "and this because of Section 42, which provides if any part of the act should be declared unconstitutional, the legislature intended to pass the statute without that part. Similar sections have been subjects of interpretation in other states and it seems *to be the concensus of belief that they impose upon the courts the duty of supporting the legislative will as far as possible.*" (Citing cases).

In *Sallee vs. Dalton*, 213 *S. W.* 762, the court said, at 764:

> "There is another reason why material parts, if not all, of this statute should be upheld, even if the assailed portions of the statute were void. There is a section of the statute which reads as follows:
>
> 'Sec. 27. If for any reason any provision of this Act shall be held to be unconstitutional, it shall not affect the remainder of the Act; but the Act, insofar as it is not in conflict with the Constitution, shall be suffered to stand.'
>
> In the case of *Snetzer vs. Gregg*, 129 *Ark.* 542, 196 *S. W.* 925, *L. R. A.* 1917*F*, 999, we passed on the question of partial unconstitutionality of a statute, and held that a provision similar to the one in the present statute, giving expression to the legislative will to put into force every part of the statute found to be constitutional and valid, was effective to preserve intact parts of statutes found to be valid, even though other portions of the same statute were violative of the Constitution."

In *Michaelson vs. Wall*, 108 *Atl.* 145, the validity of a local option act was involved. The act expressly provided that nothing in it should affect or amend any other law which prohibited the sale of liquor within the limits of any municipality. This exemption was intended to eliminate Asbury Park and it was there contended that if the exemption was invalid, the whole Act must fall, but the Court said:

> "The second answer is that the saving clause in Section 19 is not a necessary part of the legislative scheme laid down in the act, and may legitimately be disregarded if necessary to save its constitutional validity; and that this is clearly within the intention of the legislature is shown by Section 31, which provides that:
>
> 'If any provision or provisions of this Act shall be held, for any reason to be unconstitutional or invalid, it shall not affect or impair the validity of the other provisions of this Act, or any of them.' "

The attention of this Court is called to the fact that out of twelve cases in which the courts have been called upon to deal with legislative intent, as expressed by language similar to that of Section 83 of the Utilities Act, every one of them, except the Wisconsin Court in the *Bancroft case, supra*, have considered themselves bound to presume that the legislature would have passed the Act in question with the unconstitutional portion eliminated. And the attention of this Court is also called to the fact that in the *Bancroft case, supra*, the portion found

to be unconstitutional when eliminated, left nothing remaining but provisions pertaining to the administration of the eliminated portion.

In view of such universal judicial decisions, the Illinois legislature had a right to expect that the court would give effect to its intention when expressed as it is in Section 83. These decisions gave it the right to believe the courts would not judicially find it had done a foolish and useless thing. If the Illinois legislature, in its attempt to save the most important legislation of that session, has by the enactment of Section 83 done a foolish and useless thing, it does not stand alone in its stupidity.

The 66th Congress of the United States, in the enactment of legislation which will be of the utmost importance to the industrial and financial life of the whole Nation, has by the same test, done the same useless and foolish thing, in its attempt *to save the constitutional portions of important* legislation. The act to provide for the termination of Federal control of the railroads, to provide for the settlement of labor disputes and to amend the act to regulate commerce, approved February 28th, 1920, contains the provision:

> "Section 502. That if any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid such judgment shall not affect, impair or invalidate the remainder of the Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered."

In support of its conclusion that the elimination of the exemption of municipalities would cause results not contemplated or desired by the legislature, the lower court cites the cases of:

Connelly vs. Union Pipe Co., 184 *U. S.*, 540;
People vs. McBride, 234 *Ill.*, 146;
Cornell vs. People, 107 *i. d.* 372;
Hinze vs. People, 92 *i. d.* 406;
People vs. Cooper, 83 *i. d.*, 585;
Mathews vs. People, 202 *i. d.* 389;
Kellyville vs. Harrier, 207 *i. d.* 624;
(Trans. p. 43).

It does not appear from the reported decisions in a single one of these cases that the legislature had expressly stated by a separate provision in the act that it was its desire that if any portion of the act was held unconstitutional, the balance of the act should nevertheless remain in full force and effect, as is the fact in the case at bar.

XVIII.

THE CASES CITED BY THE LOWER COURT DO NOT JUSTIFY THE EXEMPTION.

The lower court says (Trans. p. 45):

"The constitutional provision does not mean that the same rule shall apply to every individual in the state under all circumstances, but only under substantially the same circumstances, and laws may be valid though operating only upon particular persons or classes if there is a valid reason for such particula

operation." (*Condon vs. City of Chicago*, 249 *Ill.* 596; *Tarantina vs. R. R. Co.*, 254 *Ill.* 624; *Dawson vs. Chicago*, 234 *Ill.* 314; *Douglas vs. People*, 225 *Ill.* 536; *Casparis vs. Ind. Bd.*; 278 *Ill.* 77.)

We have never contended that the same rule shall apply to every individual in the state under all circumstances, but we do contend that the same rule shall apply to every one under substantially the same circumstances and that when electricity is produced, distributed and sold either by a private corporation or by a municipality in its private corporate capacity, that both the municipality in that capacity and the private corporation are doing a commercial business "under substantially the same circumstances," and inasmuch as their rights and obligations are identical, a general statute purporting to provide governmental regulation for such business must apply to both *without any discrimination.*

An examination of the cases as cited by the lower court will show that they can have no application to the facts in the case at bar.

In *Condon vs. Chicago*, 249 *Ill.*, 596, the question arose as to the constitutionality of the statute requiring notice to be given the municipality of an intention to institute an action for personal injuries. There the personal injury involved was that sustained by an employee of the city by the caving in of a ditch in which he was working. It is to be assumed that the work he was doing arose out of the exercise of the city's governmental func-

tion. If it was not so connected then the question involved in the case at bar was not presented to, or decided by, the court in that case. This same kind of a statute was held constitutional in *Henry vs. Lincoln*, 140 *N. W.*, 565, *where the injury arose out of the exercise by the municipality* of its proprietary function in the operation of a light plant, by the court construing this act to apply only to municipalities in the governmental aspect, and not in the proprietary. There the court said (p. 66):

> "We are not willing to indulge the presumption that the legislature intended, by the statute quoted, *to grant any special privileges to a municipal corporation while acting in such private business capacity or relation, but rather that it intended the limitation to apply to claims against a municipality, arising out of the performance of its governmental functions or corporate duties.*"

In *Tarantina vs. R. R. Co.*, 254 *Ill.* 624, the court held that an act prohibiting the drinking of intoxicating liquor upon any smoking, parlor, day, interurban or caboose cars, and not prohibiting such drinking in a dining, buffet and sleeping car, was not unconstitutional, by reason of not including the latter cars within its operation. This case, which was reaffirmed in *Peoples vs. Jones*, 280 *Ill.* 259, instead of supporting the contention of opposing counsel, shows clearly the distinction which we have heretofore made, *i. e.*, that the difference must exist in the act performed and not in the agency performing it. In the *Tarantina and Jones cases* the distinction existed in the

business. There the prohibition was extended to the business of the transportation of passengers in smoking, parlor, day, interurban and caboose cars, and to that business when carried on by all railroad companies. It did not extend to the business of transportation of passengers in dining, buffet and sleeping cars. If there the act had attempted to extend only to certain railroad corporations transporting passengers in smoking, parlor, day, interurban or caboose cars, and not to other railroad corporations, then the difference would have been in the agency and not the business.

The next two cases relied on by the lower court are *Dawson Co. vs. Chicago*, 234 *Ill.* 314, *and Douglas vs. The People*, 225 *Ill.* 536. In the former the subject of legislation was liability for mob violence, and the court there points out a substantial difference as to such subject between a city and village. In the latter case the subject of legislation was the licensing of plumbers, and the court readily shows that the conditions existing in towns under five thousand inhabitants are not such as to require the same regulation as to licensing plumbers as the conditions which exist in towns of over five thousand inhabitants.

From the reported decision in the next case, *Casparis vs. Ind. Bd.*, 278 *Ill.* 77, neither the ground of discrimination nor the alleged differences justifying the discrimination appear, and it must therefore be presumed that

the court from the record in that case found that the act brought under its operation all who were in substantially the same circumstances.

In addition to the above, the lower court cites the case of *Railroad Company vs. Commission*, 173 *Ind.* 469, as justification for the exemption of municipalities, saying (Trans. p. 48):

> "It might just as well be argued that corporations operating steam railroads should be put in the same class for all purposes of legislation with corporations operating street railroads, because they both carry for hire passengers and freight of all kinds."

Obviously there is no such difference in the business of selling electricity by a municipality and a private corporation as there is between the business of a steam railroad and a street railroad. In the *Indiana case* relied on, there was an exemption of interurban railroads, not from the operation of the whole act, but only from provisions as to interchange of freight cars, and, as the court there said, (p. 478):

> "It is very plain that there are radical differences between the steam and electric interurban railroads relative to their construction, their motive power, their grades, their curves, size of rails, of trains, of turnouts, inability to use each others' tracks, the facilities of interurbans for handling live stock and other heavy freights, their age and experience, their dominant purpose as shown by equipment, and their general ability to comply with

freight regulations imposed upon steam roads. Add the fact that the freight business now done, or that may be done by them within their charter rights is small, and attended with but little danger to employees or travellers. The extra hazards in the movement of large and heavy freight trains, incident to steam roads, is absent from the slower one-car movement of the interurban."

No such array of differences exists in the electric lighting business when done by a municipality and a private corporation. The production, distribution and sale of electric current is the same whether it be by the municipality or any other private corporation.

The only other case cited by the court on this question is that of *C. B. & Q. vs. Doyle*, 258 *Ill.* 624, where the court held that an act of the legislature authorizing railroad corporations to extend their charters for a period of not to exceed fifty years and an act authorizing other corporations to extend their charters for a period of not to exceed ninety-nine years are not invalid as special legislation, because railroads are in a class by themselves and the legislature may pass laws concerning them which do not apply to other corporations. Such decision certainly throws no light on the question as to whether there is that real and substantial difference between a municipal corporation in its private corporate capacity and any other private corporation when both are doing identically the same business, *i. e.*, selling electricity to private consumers.

We submit that not a single one of these cases pre
sent a holding of any court that justifies the conclusio
that a real and substantial difference exists in the busi
ness of selling electricity to private consumers whe
carried on by a municipality in its private capacity an
by any other private corporation. That is the questio
presented here. There is no doubt that where a real an
substantial difference exists, the courts have heretofore
and will hereafter, hold that such difference warrants
classification.

CONCLUSION.

If a municipality is possessed of two separate and distinct characters—one governmental and the other proprietary; if in its proprietary capacity it possesses none of the attributes of sovereignty, but can accept and exercise proprietary powers solely as a distinct entity from its governmental individuality; if in the selling of electricity to private consumers it acts solely in its proprietary capacity; if in so exercising the functions of a private corporation, it is for that purpose (*quo ad hoc*) a private corporation, with the same characteristics, rights and obligations of other private corporations (engaged in the same kind of business), and none other; *then it is a contradiction of terms to say that such municipality, when selling electricity in competition with another private corporation, is not subject to the same governmental regulation as that imposed on its competitor.*

It is meaningless to say that a municipality, when engaged in a business enterprise, is a private corporation and its rights and obligations are governed by the *same rules of law* as those of all other private corporations engaged in the same business, *if the legislature has the power to exempt such municipality from the operation of the same rules of law it imposes on all other private corporations.*

If a municipality has no power to engage in a business enterprise except in the character of a private corporation, then any attempt on the part of the legislature to exempt it, in its conduct of such business, from the same governmental regulations imposed on all others, must of necessity be void. If this is attempted to be accomplished by clothing such municipality with characteristics differing from those of other private corporations engaged in the same business, such attempt is ineffectual and void, *unless it be admitted the law permits that to be done indirectly which it prohibits directly.*

It is apparent that if the municipality is exempted from the provisions of the Public Utilities Act, it is left without any governmental regulation, as the Municipal Ownership Act makes no provision for governmental regulation. *This discriminates against the patron of the municipal plant for it leaves him without protection against unreasonable rates, unjust discrimination, and the machinery to compel adequate service.*

Even if it can be said that the Municipal Ownership Act does provide for *governmental* regulation, it does not impose the *same kind* of regulation on the municipal plant as the Public Utilities Act imposes on all other utilities. The difference between these two acts in this respect is glaringly apparent. The provision in the Public Utilities Act requiring a certificate of public necessity and convenience before one plant may enter the field in competition with another, being entirely absent in the Municipal

Ownership Act, is sufficient of itself to create a special privilege and immunity in favor of the municipality in contravention of the constitution. The fact that the Municipal Ownership Act makes no provision for compelling adequate service, or the extension of plant and facilities, likewise, alone, is sufficient to show that no attempt has been made to furnish the municipal patron with the *same* protection as is afforded the patron of other plants.

For the reasons hereinabove set out it is urged the order of the Supreme Court of Illinois affirming the decree of the Circuit Court be reversed and the cause remanded with directions to reverse the decree of the Circuit Court.

Respectfully submitted,

PHILIP BARTON WARREN,

WILLIAM L. PATTON,

JOSEPH S. CLARK,

Solicitors for Plaintiff in Error.

APPENDIX

CONTAINING PUBLIC UTILITIES AND MUNICIPAL OWNERSHIP ACTS OF ILLINOIS

ILLINOIS

PUBLIC UTILITIES COMMISSION

LAW



ACT OF 1913

Amended 1915 and 1917

[Printed by authority of the State of Illinois.]

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PUBLIC UTILITIES COMMISSION LAW.

ACT *to provide for the regulation of public utilities.* Approved June 30, 1913 force January 1, 1914. (L. 1913, p. 459. Hurd's Revised Statutes 1917, Ch. 1 a., Secs. 1-86.)

ARTICLE I.

ORGANIZATION AND POWERS OF THE COMMISSION.

Public Utilities Commission—Appointment—Term—Quorum.

SECTION 1. *Be it enacted by the People of the State of Illinois, esented in the General Assembly:* That there is hereby created a e Public Utilities Commission consisting of five members. Within ty days after this Act shall take effect, the Governor shall, with the ce and consent of the Senate, appoint five persons to constitute such mission, two to serve until the first day of March, 1915, two until first day of March, 1916, and one until the first day of March, 1917. or before the first days of March, 1915, 1916 and 1917, respectively, thereafter as the term of any member expires, the Governor by and the advice and consent of the Senate, shall appoint one or two bers of the Commission, as the case may be to serve for the term x years from and after the expiration of the term of his predecessor. Commissioner shall hold office until his successor shall have been inted and qualified. Not more than three members of said Comion shall be affiliated with the same political party. The Governor from time to time designate the member of the Commission who be its chairman.

Every vacancy in the Commission shall be filled for the unexpired ion of the term by appointment by the Governor, by and with the e and consent of the Senate: *Provided,* that if any vacancy rs during the recess of the Senate, the Governor may make a temry appointment until the next meeting of the Senate.

A majority of the Commission shall constitute a quorum to transact ness; but no vacancy shall impair the right of the remaining comioners to exercise all of the powers of the Commission; and every ng, order or decision made by a commissioner, when approved and rmed by the Commission shall be and be deemed to be the finding, or decision of the Commission.

NOTE.—The "State Public Utilities Commission" was abolished by the Administrative Code of March 7, 1917, and the "Public Utilities Comon," a division of the Department of Trade and Commerce, was created invested with the powers and duties of the former Commission. The sions of the Code affecting this change are as follows:

56. The Department of Trade and Commerce shall have power:

1. To exercise through the Public Utilities Commission created by th Act all the rights powers and duties vested by law in the State Publ Utilities Commission, its officers and employees.

§ 57. The Public Utilities Commission created by this Act shall e ercise and discharge the rights, powers and duties vested by law in the Sta Public Utilities Commission under an Act entitled, "An Act to provide f the regulation of public utilities," approved June 30, 1913, in force Janua 1, 1914, or any future amendments thereto or modifications thereof.

Said Act and all amendments thereto and modifications thereof, if an shall be administered by the Public Utilities Commission created by th Act, and in its name, without any direction, supervision or control by t Director of Trade and Commerce.

§ 32. Whenever rights, powers and duties, which have heretofore be vested in or exercised by any officer, board, commission, institution or d partment, or any deputy, inspector or subordinate officer thereof, are, this Act, transferred, either in whole or in part, to or vested in a depar ment created by this Act, such rights, powers and duties shall be vested and shall be exercised by, the department to which the same are herel transferred, and not otherwise, and every act done in the exercise of su rights, powers and duties shall have the same legal effect as if done by th former officer, board, commission, institution or department, or any deput inspector or subordinate officer thereof. Every person and corporation sha be subject to the same obligations and duties and shall have the sam rights arising from the exercise of such rights, powers and duties as if su rights, powers and duties were exercised by the officer, board, commissio department or institution, or deputy, inspector or subordinate there designated in the respective laws which are to be administered by depar ments created by this Act. Every person and corporation shall be subje to the same penalty or penalties, civil or criminal, for failure to perfor any such obligation or duty, or for doing a prohibited act, as if such ob gation or duty arose from, or such act were prohibited in, the exercise such right, power or duty by the officer, board, commission, or institutio or deputy, inspector or subordinate thereof, designated in the respecti laws which are to be administered by departments created by this Ac Every officer and employee shall, for any offense, be subject to the sam penalty or penalties, civil or criminal, as are prescribed by existing la for the same offense by any officer or employee whose powers or duti devolved upon him under this Act. All books, records, papers, documen property, real and personal, unexpended appropriations, and pending bu ness in any way pertaining to the rights, powers and duties so transferr to or vested in a department created by this Act, shall be delivered an transferred to the department succeeding to such rights, powers and duties.

§ 33. Wherever reports or notices are now required to be made given, or papers or documents furnished or served by any person to or up any officer, board, commission, or institution, or deputy, inspector or su ordinate thereof, abolished by this Act, the same shall be made, give furnished, or served in the same manner to or upon the department up which are devolved by this Act the rights, powers and duties now exercis or discharged by such officer, board, commission, or institution, or deput inspector or subordinate thereof; and every penalty for failure so to shall continue in effect.

§ 34. This Act shall not affect any act done, ratified or confirmed, any right accrued or established, or any action or proceeding had or co menced in a civil or criminal cause before this Act takes effect; but su actions or proceedings may be prosecuted and continued by the departme having jurisdiction, under this Act of the subject matter to which such li gation or proceeding pertains.

The term of office and manner of appointment of commissioners w fixed in the Civil Administrative Code as follows:

§ 12. Each officer whose office is created by this Act shall be appoint by the Governor, by and with the advice and consent of the Senate.

any case of vacancy in such offices during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor shall be appointed and qualified. If the Senate is not in session at the time this Act takes effect, the Governor shall make a temporary appointment as in case of a vacancy.

§ 13. Each officer whose office is created by this Act, except as otherwise specially provided for in this Act, shall hold office for a term of four years from the second Monday in January next after the election of a Governor, and until his successor is appointed and qualified.

No provision is made in the Code for minority political representation on the Commission.

This Act in many of its features is similar to the United States Statute creating the Interstate Commerce Commission. *Farmers' Elevator Co. of Yorkville* v. *Chicago R. I. & P. Ry. Co.* 266 Ill. 567.

The Act not only confers on the State Public Utilities Commission all the powers and duties previously exercised by the Railroad and Warehouse Commission, but specifically names and includes every other kind of business of a public nature which is subject to regulation as a public utility. *State Public Utilities Commission* v. *Monarch Refrig. Co.*, 267 Ill. 528.

2. Secretary and Counsel.

§ 2. The Commission shall have a secretary, to be appointed by the Commission, to hold office during its pleasure, who shall keep a record of all proceedings, transactions, communications and official acts of the Commission and perform such other duties as the Commission may prescribe.

The Commission shall appoint as counsel to the Commission an attorney-at-law of the State of Illinois, who shall hold office at the pleasure of the Commission. The counsel to the Commission shall have power subject to the approval of the Commission to appoint and at pleasure remove attorneys-at-law to assist him in the performance of his duties.

NOTE.—The salary of the counsel of the Commission was increased to $8,000 by an amendment of June 25, 1915. The case of *Fergus et al.* v. *Russel et al.*, 270 Ill. 304 decided by the Supreme Court November 6, 1915, however, held that the Attorney General is the chief law officer of the State, and the sole official advisor of the executive officers and all boards, commissions and departments of the State government, and that it is his duty to conduct the law business of the State, both in and out of court. The office of counsel for the Commission was thus wiped out.

The office of secretary of the Public Utilities Commission is created by section 5 of the Civil Administrative Code.

3. Additional Officers and Employees.

§ 3. The Commission shall have power upon consultation with and the approval of the Governor, to appoint or employ such additional officers and such accountants, engineers, experts, inspectors, clerks, and employees as it may deem to be necessary to carry out the provisions of this Act or to perform the duties and exercise the powers conferred by law upon the Commission. Such appointments, others than those of attorneys, chief engineer, chief accountant, one private secretary or stenographer to each commissioner, experts temporarily employed and other positions which may be exempted by the Civil Service Commission, shall be included in the classifid civil service of the State, and shall be made subject to the provisions of an Act entitled, "An Act to

regulate the civil service of the State of Illinois," approved May
1905, in force July 1, 1905, and Acts amendatory thereto.

NOTE.—This section of the law is protected by the following prov
in the Civil Administrative Code:

§ 24. Nothing in this Act shall be contrued to amend, modify, or r
the State civil service law, or to extend the application thereof to
position created by this Act where the duties to be performed under
position do not now exist or are now performed by an officer or employe
in the classified civil service of the State. Every officer and employee i
classified civil service at the time this Act takes effect shall be assigned
position in the proper department created by this Act, having, so far as p
ble, duties equivalent to his former office or employment, and such officer
employees shall be employees of the State in the classified civil service o
State, of the same standing, grade and privileges which they respect
had in the office, board, commission or institution from which they
transferred, subject however, to existing and future civil service laws.
section shall not be construed to require the retention of more empl
than are necessary to the proper performance of the functions of th
partments.

4. Oath of Office—Qualifications—Bond, Etc.

§ 4. Each commissioner and each person appointed to offic
the Commission, shall before entering upon the duties of his office,
and subscribe the constitutional oath of office.

Each commissioner shall devote his entire time to the duties o
office, and shall hold no other office or position of profit, or engag
any other business, employment or vocation.

No person in the employ of or holding any official relation to
corporation or person subject in whole or in part to regulation by
Commission, and no person holding stocks or bonds in any such co
ation, or who is in any other manner pecuniarily interested the
directly or indirectly, shall be appointed to or hold the office of com
sioner or be appointed or employed by the Commission; and if any
person shall voluntarily become so interested his office or employ
shall *ipso facto* become vacant: *Provided*, that if any person becon
interested otherwise than voluntarily he shall within a reasonable
divest himself of such interest, and if he fails to do so his office or
ployment shall become vacant.

No commissioner nor person appointed or employed by the
mission shall solicit or accept any gift, gratuity, emolument or em
ment from any person or corporation subject to the supervision o
Commission, or from any officer, agent, or employee thereof; nor s
request from or recommend, directly or indirectly, to any such p
or corporation, or to any officer, agent or employee thereof the app
ment of any person to any place or position. And every such co
ation and person, and every officer, agent or employee thereof, is h
forbidden to offer to any commissioner or to any person appointe
employed by the Commission any gift, gratuity, emolument or em
ment. If any commissioner or any person appointed or employe
the Commission shall violate any provision of this paragraph he sh
removed from the office or employment held by him. Every p
violating the provisions of this paragraph shall be guilty of a
demeanor.

Before entering upon the duties of his office each commissioner shall give bond, with security to be approved by the Governor, in the sum of $20,000, conditioned for the faithful performance of his duty as such commissioner. Every person appointed or employed by the Commission, may, in the discretion of the Commission, before entering upon the duties of his office, be required to give bond for the faithful discharge of his duties, in such sum as the Commission may designate, which bond shall be approved by the Commission.

NOTE.—This provision is restated in section 7 of the Civil Administrative Code as follows:

No public utility commissioner or employee of the Public Utility Commission shall be in the employ of or hold any official relation to any corporation or person subject in whole or in part to regulation by the Commission nor shall he hold stocks or bonds in any such corporation or be in any other manner pecuniarily interested therein, directly or indirectly, and if any public utility commissioner or employee shall voluntarily become so interested, his office or employment shall *ipso facto* become vacant, and if any public utility commissioner or employee becomes so interested otherwise than voluntarily he shall, within a reasonable time, divest himself of such interest.

The provision as to oath of office and bond is restated in section 15 of the Code thus:

§ 14. Each officer whose office is created by this Act shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office, which shall be filed in the office of the Secretary of State.

§ 15. Each executive and administrative officer whose office is created by this Act, shall, before entering upon the discharge of the duties of his office, give bond, with security to be approved by the Governor, in such penal sum as shall be fixed by the Governor, not less in any case than ten thousand dollars, conditioned for the faithful performance of his duties, which bond shall be filed in the office of the Secretary of State.

The Civil Administrative Code further provides:

§ 11. Each executive and administrative officer, except the two food standard officers, the members of the mining board, and the members of the normal school board shall devote his entire time to the duties of his office and shall hold no other office or position of profit.

5. Salaries and Expenses.

§ 5. The annual salary of each commissioner shall be ten thousand dollars. The annual salary of the secretary to the Commission shall be five thousand dollars. The annual salary of the counsel to the Commission shall be six thousand dollars. All officers, accountants, engineers, cerks inspectors, experts and employees of the Commission shall receive the compensation fixed by the Commission subject to the approval of the Governor.

The commissioners and their officers, accountants, engineers, clerks, inspectors, experts and other employees, shall have reimbursed to them all actual and necessary traveling and other expenses and disbursements necessarily incurred or made by them in the discharge of their official duties. The Commission may also incur necessary expenses for office furniture, stationery, printing and other incidental expenses. Said salaries and expenses shall be paid out of moneys appropriated for the Commission, only upon the order of the chairman of the Commission, approved by the Governor.

NOTE.—The Civil Administrative Code provides:

§ 9. The executive and administrative officers whose offices are created by this Act shall receive annual salaries, payable in equal monthly installments as follows: * * *

Each public utility commissioner shall receive seven thousand dollars;

The Secretary of the Public Utilities Commission shall receive four thousand dollars.

Section 5 of the Act is not unconstitutional. *State Public Utilities Commission ex rel. Mitchell et al* v. *Chicago & West Towns Ry. Co.*, 275 Ill. 555.

6. Office of the Commission—Meetings—Seal, Etc.

§ 6. The office of the Commission shall be in the State Capitol. Such office shall be open for business between the hours of eight in the morning and five in the evening throughout the year and one or more responsible persons to be designated by the Commission or by the secretary under the direction of the Commission shall be on duty at all times in immediate charge thereof.

The Commission shall hold stated meetings at least once a month at its office and may hold such special meetings as it may deem necessary at any place within the State.

The Commission may, for the authentication of its records, process and proceedings, adopt, keep and use a common seal, of which seal judicial notice shall be taken in all courts of this State; and any process, writ, notice or other paper which the said Commission may be authorized by law to issue shall be deemed sufficient if signed by the secretary of said Commission and authenticated by such seal; and all Acts, orders, proceedings, rules entries, minutes, schedules and records of said Commission, and all reports and documents filed with said Commission, may be proved in any court of this State by a copy thereof, certified to by the secretary of said Commission, with the seal of said Commission attached.

NOTE.—The provisions of the Civil Administrative Code affecting this section are as follows:

§ 16. The director of each department is empowered to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its employees and clerks, the distribution and performance of its business and the custody, use and preservation of the records, papers, books, documents and property pertaining thereto.

§ 17. Each department shall maintain a central office in the capitol building at Springfield, in rooms provided by the Secretary of State. The director of each department may, in his discretion and with the approval of the Governor, establish and maintain, at places other than the seat of government, branch offices for the conduct of any one or more functions of his department.

§ 18. Each department shall be open for the transaction of public business at least from eight-thirty o'clock in the morning until five o'clock in the evening of each day except Sundays and days declared by the negotiable instrument Act to be holidays.

§ 19. Each department shall adopt and keep an official seal.

§ 20. Each department is empowered to employ, subject to civil service laws in force at the time the employment is made, necessary employees, and, if the rate of compensation is not otherwise fixed by law, to fix their compensation.

§ 21. All employees in the several departments shall render not less than seven and one-half hours of labor each day, Saturday afternoons, Sundays and days declared by the negotiable instrument Act to be holidays

excepted in cases in which, in the judgment of the director, the public service will not thereby be impaired.

§ 22. Each employee in the several departments shall be entitled during each calendar year to fourteen days' leave of absence with full pay. In special and meritorious cases where to limit the annual leave to fourteen days in any one calendar year would work peculiar hardship, it may, in the discretion of the director of the department, be extended.

§ 23. No employee in the several departments, employed at a fixed compensation, shall be paid for any extra services, unless expressly authorized by law.

7. Fees to be Charged by Commission.

§ 7. The Commission shall charge and collect the following fees: For copies of papers and records not required to be certified or otherwise authenticated by the Commission, ten cents for each folio; for certified copies of evidence and proceedings before the Commission or of official documents and orders filed in its office fifteen cents for each folio, and one dollar for every certificate under seal affixed thereto; for certifying a copy of any report made by a public utility to the Commission, for each certified copy of the annual report of the Commission, one dollar. No fees shall be charged or collected for copies of papers, records, or official documents furnished to any city or public officers for use in their official capacity, or for the annual reports of the Commission in the ordinary course of distribution, but the Commission may fix reasonable charges for publications issued under its authority. All fees charged and collected by the Commission shall belong to the people of the State, and shall be paid monthly, accompanied by a detailed statement thereof, into the treasury of the State to the credit of the general fund.

NOTE.—See *Kennedy* v. *State Public Utilities Commission*, 286 Ill. 490.

8. Supervision of Utilities—Rules and Regulations—Records—Reports of Commission.

§ 8. The Commission shall have general supervision of all public utilities, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipments and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the Commission and with the charter and franchise requirements.

In case any public utility is engaged in carrying on any business other than that of a public utility, which other business is not otherwise subject to the jurisdiction of the Commission, such public utility in respect of such other business shall be subject to inquiry, examination and inspection by the Commission in the same manner as the public utility business in so far as such inquiry, examination and inspection may be necessary to enforce any provision of this Act. The determination of the Commission that a necessity for any regulation of non-public

business of a public utility exists shall be *prima facie* evidence of the fact in any action in a court of this State to enforce or set aside an order or ruling of the Commission.

The Commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of railroad or other public utility Commissions of other states and with the Interstate Commerce Commission on any matters relating to public utilities.

The Commission shall have power to adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings, and to alter and amend the same.

All proceedings of the Commission and all documents and records in its possession shall be public records, except as in this Act otherwise provided. The Commission shall make an annual report to the Governor on or before the first day of December in each year, after the year 1913, which shall contain copies of all orders issued by it, and any information in the possession of the Commission which it shall deem of value to the people of the State.

The Commission shall conduct a hearing and take testimony relative to any pending legislation with respect to any person, corporation or matter within its jurisdiction, if requested to do so by the General Assembly or by either branch thereof, or by a standing committee of either branch thereof, and shall report its conclusions to the General Assembly. The Commission may also recommend the enactment of such legislation with respect to any matter within its jurisdiction as it deems wise or necessary in the public interest. The Commission shall, at such times as the Governor shall direct, examine any particular subject connected with the condition and management of public utilities, and report to him in writing its opinion thereon with its reasons therefor.

NOTE.—The Commission is an administrative body, not a court, and has no jurisdiction to adjudicate controverted rights of parties growing out of contract. *People ex rel. Bd. of Administration* v. *Peoria & Pekin Union Ry. Co.*, 273 Ill. 40.

The Commission has no arbitrary power permitting it to enter a confiscatory order. *State Public Utilities Commission ex rel. Beck* v. *Toledo, St. Louis & Western R. Co.*, 267 Ill. 93.

JURISDICTION IN GENERAL:

The Public Utilities Act "expressly authorizes this Commission to determine and fix the just, reasonable and sufficient rates or other charges, classifications, rules, regulations, contracts or practices of any public utility doing business within the State. No limitation of such powers of the Commission is to be found in the Act." *Re Mississippi Valley Teleph. Co.*, III. I. P. U. C. 24, P. U. R. 1917-B 340. *Citizens of Aledo v. Peoples' Tel. Co. et al.*, III. I. P. U. C. 43.

"The statute providing for the regulation of public utilities within the State was passed in the exercise of the police powers of the State and all ordinances or contracts affecting rates or charges by public utilities, for commodities or services to be rendered or performed by them, must be held to have been made in view of, and subject to the right of the State to exercise this police power in such a way as to disregard such contracts or ordinances if the interests and welfare of the public should so demand." *Re Mississippi Valley Teleph. Co.*, III I. P. U. C. 24, 26, P. U. R. 1917-B 368; see also *Hite* v. *Cincinnati, Indianapolis & W. R. Co.*, 284 Ill. 297; *Re Polo Mutual Telephone Co.*, Ill I. P. U. C. 31, P. U. R. 1916-B 310.

The Public Utilities Commission is given no abritrary power by the statute and the orders of the Commission must be lawful and reasonable. *State Public Utilities Comm. ex rel.* v. *Chicago, Milwaukee & St. Paul Ry.*, 287 Ill. 412.

The Commissions' rate making power is not limited by the provisions of private contracts. *Danvers Teleph. Co.* v. *Carlock Farmers' Teleph. Co.*, V I. P. U. C. 1, P. U. R. 1918-A 235; *Re Rockford Elec. Co.*, V I. P. U. C. 35, P. U. R. 1918-A 56. See however the amendment of 1919 to Sec. 39 of the Act.

The Commission's jurisdiction is not restricted by the terms of contractual ordinances and franchises. *Re Kewanee Home Teleph. Co.*, V I. P. U. C. 20, P. U. R. 1918-B 172; *Re Bloomington & Normal Ry. & L. Co. et al.*, V I. P. U. C. 43.

Galva Elec. L. Co., V I. P. U. C. 747; *Re Mariana Teleph. Co.*, V I. P. U. C. 3; *Re Decatur Ry. L. Co.*, V I. P. U. C. 906; *Stein* v. *Chicago Teleph. Co.*, V I. P. C. 908; *Re City Water Co. of Shelbyville* V I. P. U. C. 992; *Re Central Ill. Public ervice Co.*, V I. P. U. C. 1023, P. U. R. 1918-F 820.

The Commission has no power to compel performance of a private contract. *anvers Teleph. Co.* v. *Carlock Farmers' Teleph. Co.*, V I. P. U. C. 16, P. U. R. 918-A 235; *North American Car Co.* v. *Indiahoma Refining Co.*, V I. P. U. C. 160; *oone County Co-op. Teleph. Co.* v. *Belvidere Teleph. Co.*, V I. P. U. C. 940, P. U. . 1918-F 97.

The Commission has power to consider the construction of private contracts ade by a utility when such consideration is necessary to determine the interests f persons seeking to be made parties to the proceeding. *Re Western Illinois eleph. Co. et al.*, V I. P. U. C. 1.

The Commission has no jurisdiction to override an injunctional order issued y a Circuit Court requiring a utility to serve a consumer at rates fixed by con- ract. *Re Illinois Northern Utilities Co.*, VI I. P. U. C. 136.

The Commission has jurisdiction over all intercorporate contracts between tilities. *Re Quincy Gas. Elec. & H. Co. et al.*, III I. P. U. C. 98.

The Commission has no jurisdiction over disputes between a utility and a unicipality relative to franchise provisions. *City of Bushnell* v. *Central Ill. ublic Service Co.*, III I. P. U. C. 57.

The Commission has no jurisdiction to enforce a local assessment for paving gainst an electric railroad company. *Orvis* v. *Chicago & M. Elec. R. Co.*, II I. P. . C. 84, P. U. R. 1915-A 1000.

The Commission has no jurisdiction to compel an electric railroad company o maintain the streets on which its tracks are laid in such manner as not to nterfere with the public use. *Orvis* v. *Chicago & M. Elec. R. Co.*, II I. P. U. C. 4, P. U. R. 1915-A 1000; *Re Quincy Ry. Co.*, VI I. P. U. C. 435.

The Commission has no authority to compel a street railway company to carry ail carriers free in accordance with the provisions of a city ordinance. *Ericson Evanston St. Ry. Co.*, III I. P. U. C. 61, P. U. R. 1916-B 918. See also *Golden pringfield Consolidated Ry. Co.*, VI I. P. U. C. 271.

The Commission has no jurisdiction to order the removal of old decayed tele- hone poles when their removal is primarily a question of compliance with a ranchise ordinance. *City of Genoa* v. *De Kalb County Teleph. Co.*, II I. P. U. . 83.

The Commission has no jurisdiction over street lighting franchises. *City of ushnell* v. *Central Ill. Public Service Co.*, III I. P. U. C. 57; *Hubbard* v. *Public ervice Co. of N. Illinois et al.*, V I. P. U. C. 44.

The Commission has no jurisdiction over a dispute between a telephone com- any and a subscriber as to the number of messages sent from the subscriber's hone. *Fulton* v. *Chicago Teleph. Co.*, IV I. P. U. C. 153, P. U. R. 1917-A 527.

The Commission has no power to compel an electric consumer to repair his ervice line connecting with the company's transmission line, or to require him to eep it in a safe condition. *Abbott L. & P. Co.* v. *Parks* III I. P. U. C. 96, P. U. R. 916-D 1093.

It was the intention of the legislature, as manifested by the language of the ct to give the Commission a very large and comprehensive jurisdiction over the ffairs and operation of public utilities, but it is not the intention that the Com- ission should be allowed to substitute its management for the management of the ompanies. *Citizens of Aledo* v. *Peoples' Teleph. Co. et al.*, III I. P. U. C. 43.

The Commission has jurisdiction over the sale of a public utility plant to the unicipality. *Public Utilities Comm.* v. *Citizens W. W. Co.*, V I. P. U. C. 550.

The Commission has jurisdiction over prior orders of the Railroad & Ware- ouse Commission. *Re Wabash, Chester & Western R. et al.*, III I. P. U. C. 49; *llinois Central R. Co. et al.* v. *Bloomington etc. R. Co.*, IV I. P. U. C. 105.

The Commission's jurisdiction relative to discontinuance of service is ex- lained in the following cases. *Re Central Ill. Public Service Co.*, III I. P. U. C. 93, . U. R. 1916-B 920; *City of Pana* v. *Central Ill. Public Service Co.*, III I. P. U. C. 5.-P. U. R. 1916-B 177; *Re Fairview Transp. Co.*, IV I. P. U. C. 159, P. U. R. 917-E 44; *Village of Palestine* v. *Oblong Gas Co.*, V I. P. U. C. 10.

The Commission has power to require an electric railway to permit another tility to use its tracks, wires and poles where the public convenience so requires. *Feathersby* v. *Decatur Ry. & L. Co. et al.*, VI I. P. U. C. 360.

The Commission has no jurisdiction to award damages to a shipper for an lleged loss caused by giving the wrong number of a car in a bill of lading. *Mund- enk Fuel Co.* v. *Chicago & E. Ill. R. Co.*, II. I. P. U. C. 89

Charges of an electric utility for making minor repairs upon the consumer's wn equipment, covering the cost of delivery of lamps on renewal and of the alling for or delivery by the company of heating appliances in need of repair are ot within the jurisdiction of the Commission because such services are not a part f the company's public utility business. *Public Utilities Comm.* v. *Commonwealth dison Co.*, V. I. P. U. C. 1276, P. U. R. 1918-F 109.

. Utilities to Comply with Requests and Obey Orders of Commission.

§ 9. Every public utility shall furnish to the Commission all in- ormation required by it to carry into effect the provisions of this Act, nd shall make specific answers to all questions submitted by the Com- ission.

Any public utility receiving from the Commission any blanks with directions to fill the same, shall cause the same to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall give a good and sufficient reason for such failure; and said answer shall be verified under oath by the president, secretary, superintendent or general manager of such public utility and returned to the Commission at its office within the period fixed by the Commission.

Whenever required by the Commission, every public utility shall deliver to the Commission, any or all maps, profiles, reports, documents, books, accounts, papers and records in its possession, or in any way relating to its property or affecting its business, and inventories of its property, in such form as the Commission may direct, or verified copies of any or all of the same.

Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the Commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

10. Definitions.

§ 10. Unless otherwise specified, the word "Commission," when used in this Act, means the State Public Utilities Commission of Illinois, which is created and established under the provisions of this Act.

The term "commissioner," when used in this Act means one of the members of the Commission.

The term "public utility," when used in this Act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter:

(a) May own, control, operate or manage, within the State, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this State; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water; or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger; or that

(b) May own or control any franchise, license, permit or right to engage in any such business.

The term "common carrier," when used in this Act, includes all railroads, street railroads, express companies, private car lines, sleeping car companies, fast freight lines, steamboat lines and other common carriers by water, and every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever, owning,

operating or managing any such agency for public use in the transportation of persons or property within the State.

The term "railroad," when used in this Act, includes every railroad other than a street railroad, by whatsoever power operated for public use in the transportation of persons or property for compensation, with all bridges, ferries, tunnels, equipment, switches, spurs, tracks, poles, wires, stations, real estate and terminal facilities of every kind, used, operated, controlled or owned by or in connection with any railroad.

The term "street railroad," when used in this Act, includes every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the transportation of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or incorporated town, and including all equipment, switches, spurs, tracks, poles, wires, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind, together with all real estate used, operated, controlled or owned by or in connection with any such street railroad; but the said term "street railroad," when used in this Act, shall not include a railroad constituting or used as part of a trunk line railroad system.

The term "transportation of persons," when used in this Act, includes any service in connection with the receipt, carriage and delivery of the person transported and his baggage, and all facilities, used or necessary to be used in connection with the safety, comfort and convenience of the person transported.

The term "transportation of property," when used in this Act, includes any service in connection with the receipt, carriage, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property transported.

The term "express company," when used in this Act, includes every corporation, company, association, joint stock company or association, firm partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever, engaged in the transportation of freight, merchandise or other property for compensation on the route or line of any other common carrier.

The term "company," when used in this Act in connection with a public utility, includes any corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever, owning, holding, operating, controlling or managing such a public utility, but not municipal corporations.

The term "corporation," when used in this Act, includes any corporation, company, association, joint stock company or association, but not municipal corporations.

The term "person," when used in this Act, includes an individual, firm or co-partnership.

The term "warehouse," when used in this Act, includes all elevators or storehouses where grain is stored for a compensation, whether the property stored be kept separate or not.

The term "wharfinger," when used in this Act, includes every cor-
poration, not municipal, or person, their lessees, trustees, or receiver
appointed by any court whatsoever, owning, controlling, operating o
managing any dock, wharf, or structure used by vessels or other wate
craft in connection with or to facilitate the receipt or discharge o
freight or passengers within this State.

The term "service," when used in this Act, is used in its broades
and most inclusive sense, and includes not only the use or accommo-
dation afforded consumers or patrons, but also any product or com-
modity furnished by any public utility and the plant, equipment, appar-
atus, appliances, property and facilities employed by, or in connectio
with, any public utility in performing any service or in furnishing an
product or commodity and devoted to the purposes in which such publi
utility is engaged and to the use and accomodation of the public.

The term "rate," when used in this Act, includes every individua
or joint rate, fare, toll, charge, rental or other compensation of an
public utility or any two or more such individual or joint rates, fares
tolls, charges, rentals or other compensations of any public utility o
any schedule or tariff thereof, and any rule, regulation, charge, practic
or contract relating thereto.

The term "city council," when used in this Act, includes th
mayor and commissioners of cities which have adopted the Commissio
form of municipal government and the council of all other cities an
villages.

The term "city," when used in this Act includes all villages.

NOTE.— The Commission has jurisdiction over cold storage warehouses. *Stat
Public Utilities Comm.* v. *Monarch Refrigerating Co.*, 267 Ill. 528.

A mutual telephone association is a public utility, even though it does no
operate for profit, if its service is open, so far as its business extends, to anyon
who is willing to become a member. *State Public Utilities Comm. ex rel. Nobl
Telegraph. Co.* v. *Noble Mutual Teleph. Co. et al.* 268 Ill. 411; *State Public Utilitie
Comm. ex rel. Pike County Teleph. Co.* v. *Noble et al.*, 275 Ill. 121; *Evansvill
Teleph. Co.* v. *Okaw Valley Mut. Teleph. Ass'n.* IV I. P. U. C. 128, P. U. R. 1917-I
736, revd. 282 Ill. 336 on the ground that since the charter of the associatio
limits its powers to the operation of the telephone system for its members only
has no right to serve the public and no right to engage in a public utility busines
and the fact that the association actually does serve the public does not brin
it within the Act. (To this effect see also *State Public Utilities Comm. ex re
Macon County Teleph. Co.* v. *Bethany Mutual Teleph. Ass'n.*, 270 Ill. 183.); *Villag
of La Prairie* v. *Shilo Teleph. Co. et al.*, IV I. P. U. C. 135; *Public Utilities Comm
v. Edwards Co. Independent Teleph. Ass'n.*, V I. P. U. C. 1160; See also *Buncomb
Teleph. Co.* v. *McGinnis* 268 Ill. 504.

"The question whether a person or corporation is operating a public utilit
is determined not by what business it is authorized by its charter to transact, bu
by the character of the business which it in fact and practice does transact." *R
Whitehall Ry. Co.*, V I. P. U. C. 589; *but see Okaw Valley and Bethany Mutu
cases* (282 Ill. 336 and 170 Ill. 183) cited above.

An individual operating a rural telephone system open to public use is withi
the provisions of section 10 of the Act. *4-C Teleph. Co.* v. *Helmer*, IV I. P. U. C
125, P. U. R. 1917-D 197.

A non-operating telegraph company may be a public utility within the meanin
of the Act. *State Public Utilities Comm.* v. *Western Union Teleph. Co.*, III I. P
U. C. 77, P. U. R. 1916-E 432.

Taxi-cabs have been held not to be within the provisions of the Act. New
comb v. *Yellow Cab. Co.*, III I. P. U. C. 69, P. U. R. 1916-B 983; *Hughes et al.* v
Atlas Co., III I. P. U. C. 71.

Jitney buses plying between regular termini over fixed routes have been hel
public utilities. *Tri City Ry. Co.* v. *Dietz*, III I. P. U. C. 72; *Quincy R. Co.* v. *Sna
der et al.*, III I. P. U. C. 76 but see *Re Auto Transportation Co.*, VI I. P. U. C. 3
in which the Commission held that it has no jurisdiction over motor vehicles ope
ating outside incorporated cities, villages or unincorporated towns.

The Commission has taken jurisdiction over motor buses. *Re Chicago Stag
Co.*, V I. P. U. C. 166.

The Commission has jurisdiction over motor freight distributing companie
Re Chicago & Interurban Trac. Co., III I. P. U. C. 81, P. U. R. 1916-E 761; *R
Interurban Motor Despatch*, VI I. P. U. C. 216.

The Commission has jurisdiction over a stock yards company operating a railway. *St. Louis National S. Y. v. Illinois R. Co. et al.*, IV I. P. U. C. 139.

An elevator operated in connection with the private business of buying and selling grain, and not open for public use is not a public utility. *Re Winchester Farmers' Elevator & Mercantile Co.*, V I. P. U. C. 569, P. U. R. 1918-E 849.

Team tracks, terminals and spur tracks are within the terms of the Act. *Moline Sand Co. v. Chicago Burlington & Quincy R. Co.*, IV I. P. U. C. 100; *Turns Coal Co. v. Louisville & Nashville R. Co.*, IV I. P. U. C. 103; *Paul Kuhn & Co. v. Louisville & Co. v. Cleveland, Cincinnati, Chicago & St. Louis R. Co.*, V I. P. U. C. 251.

A switching railway is within the terms of the Public Utilities Act. *Re Springfield Terminal Ry. Co.*, V I. P. U. C. 805; *E. St. Louis, C. & W. R. Co. v. Pittsburgh, C. C. & St. Louis R. Co.*, V I. P. U. C. 420, P. U. R. 1918-E 654.

The Commission has exercised jurisdiction over an oil pipe line company. *Re Illinois Pipe Line Co.*, VI I. P. U. C. 232.

A corporation which renders water service to a municipality and a steam railroad operating therein, but to no other consumers, is a public utility within the meaning of the Act. *Re Central Illinois Public Service Co.*, VI I. P. U. C. 288.

ARTICLE II.

Reports and Accounts.

11. Accounts, Uniform System of.

§ 11. The Commission shall have power to establish a uniform system of accounts to be kept by public utilities or to classify public utilities and to establish a uniform system of accounts for each class and to prescribe the manner in which such accounts shall be kept. It may also, in its discretion, prescribe the forms of accounts to be kept by public utilities, including records of service, as well as accounts of earnings and expenses, and any other forms, records and memoranda which in the judgment of the Commission may be necessary to carry out any of the provisions of this Act. The system of accounts established by the Commission and the forms of accounts prescribed by it shall not be inconsistent, in the case of corporations subject to the provisions of the Act of Congress entitled, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the Acts amendatory thereof and supplementary thereto, with the systems and forms from time to time established for such corporations by the Interstate Commerce Commission, but nothing herein contained shall effect the power of the Commission to prescribe forms of accounts, for such corporations, with the approval of the Interstate Commerce Commission, covering information in addition to that required by the Interstate Commerce Commission. Where the Commission has prescribed the forms of accounts to be kept by any public utility for any of its business, it shall thereafter be unlawful for such public utility to keep any accounts for such business other than those prescribed or approved by the Commission, or those prescribed by or under the authority of any other state or of the United States.

The Commission may, from time to time, altar, amend or repeal, in whole or in part, any uniform system of accounts, or the forms and manner of keeping accounts.

Note.— *Re Lena Electric Light & Power Co.* V I. P. U. C. 237, P. U. R. 1918-C 986; *Re Johnson County Mut. Teleph. Co.*, III I. P. U. C. 297; See General Orders Nos. 51-54, VI I. P. U. C. 291 and note, and General Orders Nos. 15 & 16.

12. Other Than Public Utility Business.

§ 12. The Commission may require every public utility engaged directly or indirectly in any other than a public utility business, as defined by law, to keep separately in like manner and form the accounts

of all such other business, and the Commission may provide for the e amination and inspection of the books, accounts, papers and records such other business, in so far as may be necessary to enforce any pr vision of this Act. The Commission shall have power to inquire as and prescribe the apportionment of capitalization, earnings, debts an expenses fairly and justly to be awarded to or borne by the ownershi operation, management or control of such public utility as distinguishe from such other business.

NOTE.—Each of the several general orders of the Commission prescribing un form systems of acounts for the divers types of utilities contain the following pr vision:

"Every utility, or owner or operator of such utility, conducting a busine other than public utility business in connection with the operaton of the publ utility undertaking must keep records showing fully the details of such oth business. The records must be so kept that the records pertaining to the utili business may be readily separated from those pertaining to other business, order that the cost of rendering the utility service, the revenue derived ther from and the rate of return upon the capital invested in property used in re dering such utility service may be readily ascertained."

13. Forms of Accounts.

§ 13. Such systems of accounts shall provide for forms showin all sources of income, the amounts due and received from each sourc and the amounts expended and due for each purpose, distinguishin clearly all payments for operating expenses from those for new co struction, extensions and additions; and for balance sheets showin assets and liabilities and various forms of proprietary interest.

NOTE.—See General Orders Nos 51-54, VI I. P. U. C. 291 and note. Ge eral Order No. 54 provides that:

"The accounts, rules, definitions and instructions herein set forth compri a system of accounts and records prescribed by the Commission for the use all public heating utilities within its jurisdiction. All such utilities are require to keep their books of account and subsidiary records in conformity with th system.

"The records of heating utilities shall be kept with sufficient detail to sho fully all facts pertaining to the entries made in the prescribed accounts. Th entries in the general books, when full information is not recorded, must conta references which unmistakably identify the particular records in which the fu details of such entries are shown. All records must be filed so as to be readil accessible for examination by representatives of the Commission.

"All records, financial papers, books, vouchers and documents pertaining any or all utility's property or its corporate or financial affairs (except certificat representing retired and cancelled security issues or other papers the destructio of which may be authorized by order of the Commission) must be permanentl preserved. All other original records must be preserved pending the issuance such further order as the Commission shall make in the premises.

"Every heating utility, or owner or operator of such utility, conducting business other than public utility business in connection with the operation of th public utility undertaking must keep records showing fully the details of such othe business. The records must be so kept that the records pertaining to the utilit business may be readily separated from those pertaining to other business, in orde that the cost of rendering the heating utility service, the revenue derived therefro and the rate of return upon the capital invested in property used in rendering suc utility service may be readily ascertained."

Each of the other general orders mentioned contains similar provisions.

14. Depreciation Accounts.

§ 14. The Commission shall have power, after hearing, to requir any or all public utilities to keep such accounts as will adequately reflec depreciation, obsolescence and the progress of the arts. The Commis sion may, from time to time, ascertain and determine and by order fi the proper and adequate rate of depreciation of the several classes property for each public utility; and each public utility shall confor its depreciation accounts to the rates so ascertained, determined an fixed.

NOTE.—For Commission holdings on depreciation in general see: *City of Sprin field* v. *Springfield Gas & Elec. Co.*, III I. P. U. C. 324, P. U. R. 1916-C 281; *Ci*

of Lincoln v. *Lincoln Water & Light Co.*, IV I. P. U. C. 574, P. U. R. 1917-B 1; *Re Chicago North Shore & M. R. Co.*, IV I. P. U. C. 717, P. U. R. 1918-A 388; etc.

Each of the general orders prescribing uniform systems of accounts for the several types of utilities contain provision substantially as follows:

"17. DEPRECIATION RESERVE.

"To this account shall be credited all amounts charged to operating expense account No. 692, "Depreciation," to provide for accruing depreciation in the utility plant and equipment; also amounts charged to account No. 413, "Depreciation Not Covered by Reserves," if any amounts have been charged thereto as provided in that account. There shall also be credited hereto amounts chargeable to account No. 411, "Surplus applied to sinking fund and other reserves," representing interest and income from moneys and investments belonging to the depreciation fund.

"This acount should also be credited with any amount carried in reserve at December 31, 1918, to cover depreciation on plant and equipment.

"Depreciation on property included in balance sheet account No. 104, "Miscellaneous Physical Property," may be included in this account under a subdivision showing clearly to what property it is applicable.

"When any property is destroyed, sold, or otherwise retired from service, the cost of such property as carried on the books at the time of retirement should be charged to this account, less insurance and salvage recovered thereon.

"If the charges to this account on account of property retired exceed the amount provided herein (due to inadequate charges previously made for depreciation) there should be charged to account No. 413, "Depreciation Not Covered by Reserves," and credited to this account an amount sufficient to provide an adequate reserve. (See also text of account No. 413.)

"Read carefully the instructions relative to depreciation in the instructions pertaining to operating expenses, page 99, and instructions pertaining to "Property Retired," page 52, also the text of account 141, "Depreciation Fund."

"NOTE.—Companies operating more than one utility (electric, gas, heating, or water) and keeping only one set of balance sheet accounts are required to open and maintain a separate subaccount for the depreciation reserve of each utility."

15. Audit and Inspection.

§ 15. The Commission may provide for the examination and audit all accounts, and all items shall be allocated to the accounts in the manner prescribed by the Commissioon. The officers and employees of the Commission shall have authority under the direction of the Commission to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utilities.

NOTE.—Each of the general orders prescribing uniform systems of accounts contains the following provision.

"In prescribing this system of accounts, the Commission does not bind itself to approve any item set out in any account, either as to amount or character, for rate fixing purposes or when authorizing the issuance of securities. The prescribed system of accounts is designed to set out the facts in connection with the income, expenditures, etc., and therefrom the Commission will determine, when engaged in fixing rates or approving isues of securities, just what consideration shall be given to the various items in the several accounts."

16. Accounts to be Kept in State.

§ 16. Each public utility shall have an office in one of the cities, villages or incorporated towns in this State in which its property or some part thereof is located, and shall keep in said office all such books, accounts, papers, records and memoranda as shall be ordered by the Commission to be kept within the State. The address of such office shall be filed with the Commission. No books, accounts, papers, records, or memoranda ordered by the Commission to be kept within the State shall be at any time removed from the State, except upon such conditions as may be prescribed by the Commission.

NOTE.—The Commission granted two telephone companies permission to keep their books, records, papers and accounts outside the State in consideration of the resulting economy and efficiency, on condition that such books and papers would be produced at any place within the State at any time requested by the Commission and that the Commission would be permitted to inspect them at any time. *Kinlock-Bloomington Teleph. Co. et al.*, II I. P. U. C. 109, P. U. R. 1915-B 248 amending conference Rule No. 1. See also *Re Southern Bell Teleph. Co.*, III I. P. U. C. 238; *Re City Water Co. of E. St. L. & Granite City et al.*, III I. P. U. C. 627; *Re Southern Ill. L. & P. Co. et al.*, IV I. P. U. C. 911; *Re Streackfus Steamboat Line*, IV I. P. U. C. 911.

17. Falsification or Destruction of Accounts.

§ 17. Any person who shall wilfully make any false entry in accounts, or in any record or memorandum kept by a public utility, who shall wilfully destroy, mutilate, alter, or by any other means device falsify the record of any such account, record or memorandu or who shall wilfully neglect or fail to make full, true, and cor entries in such accounts, records, or memoranda of all facts and tra actions appertaining to the business of the public utility, or shall k any accounts or record other than those prescribed or approved by Commission, shall be guilty of a misdemeanor, and upon conviction, subject to imprisonment in the county jail not exceeding one year, to a fine not exceeding one thousand dollars, or to both.

NOTE.—See General Order No. 17. Each of the general orders prescribing form systems of accounts contains the following provisions:

"All records, financial papers, books, vouchers and documents pertainin any or all of the utility's property or its corporate or financial affairs (ex certificates representing retired and cancelled security issues or other papers destruction of which may be authorized by order of the Commission) must be manently preserved. All other original records must be preserved pending issuance of such further order as the Commission shall make in the premises.

"The records of (water) utilities shall be kept with sufficient detail to show all facts pertaining to the entries made in the prescribed accounts. The en in the general books, when full information is not recorded, must contain refere which unmistakably identify the particular records in which the full detail such entries are shown. All records must be filed so as to be readily acces for examination by representatives of the Commission."

18. Penalty for Divulging Information.

§ 18. Any officer or employee of the Commission who divul any fact or information coming to his knowledge during the course of inspection, examination or investigation of any account, record, mem andum, book or paper of a public utility, except in so far as he may authorized by the Commission or by a court of competent jurisdict or a judge thereof, shall be guilty of a misdemeanor, and upon c viction, be subject to imprisonment in the county jail not exceed one year, or to a fine not exceeding one thousand dollars, or to both.

19. Reports by Public Utilities—Penalties for Failure to Report—F Report.

§ 19. Each public utility in the State shall each year after year 1913 furnish to the Commission, in such form as the Commis shall require, annual reports as to all the items mentioned in the ceding sections of this article, and in addition such other items, whe of a nature similar to those therein enumerated or otherwise, as Commission may prescribe. Such annual reports shall contain all required information for the period of twelve months ending on thirtieth day of June in each year, or ending on the 31st day of De ber in each year, as the Commission may by order prescribe for class of public utilities, and shall be filed with the Commission a office in Springfield within three months after the close of the yea which the report is made. The Commission shall have authority t quire any public utility to file monthly reports of earnings and exp of such utility, and to file other periodical or special, or both perio and special reports concerning any matter about which the Commi is authorized by law to keep itself informed. All reports shall be u oath.

When any report is erroneous or defective or appears to the Commission to be erroneous or defective, the Commission may notify the public utility to amend such report within thirty days, and before or after the termination of such period the Commission may examine the officers, agents, or employees, and books, records, accounts, vouchers, plant, equipment and property of such public utility, and correct such items in the report as upon such examination the Commission may find defective or erroneous.

All reports made to the Commission by any public utility and the contents thereof shall be open to public inspection, unless otherwise ordered by the Commission. Such reports shall be preserved in the office or [of] the Commission.

Any public utility which fails to make and file any report called for by the Commission within the time specified; or to make specific answer to any question propounded by the Commission within thirty days from the time it is lawfully required to do so, or within such further time, not to exceed ninety days, as may in its discretion be allowed by the Commission, shall forfeit $100 for each and every day it may so be in default.

Any person who wilfully makes any false return or report to the Commission, or to any member, officer or employee thereof, and any person who aids or abets such person shall, upon conviction, be subject to imprisonment in the county jail not exceeding one year, or to a fine not exceeding one thousand dollars, or both.

ARTICLE III.

Stocks and Bonds—Capitalization—Intercorporate Relations—Franchises—Valuation.

20. Right to Issue Stocks, Bonds, Etc.

§ 20. The power of public utilities to issue stocks, stock certificates, bonds, notes and other evidences of indebtedness and to create liens on their property is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the State, and such power shall be exercised by the Commission hereby created according to the provisions of this Act and under such rules and regulations as the Commission may prescribe.

The Commission shall provide, by serial number or other device to be placed on the face thereof, for the proper and easy identification of such stocks, stock certificates, bonds, notes and other evidences of indebtedness as may be issued by public utilities under the provisions of this article.

Note.—One utility may be authorized to issue bonds to purchase property from another at a price in excess of its value, where better service will result; but the excess must not be charged to operating expenses or capital and with the expense of the bond issue must be amortized or charged to profit and loss. *Re Tyrone Electric Co.*, III I. P. U. C. 140, P. U. R. 1916-E 708.

A gas company, upon organization, was permitted to use "$473,700 proceeds from the sale of stock and bonds for acquisition of property and construction of facilities; $67,928 for engineering, superintendence, omissions, interest during construction, and legal expenses; $50,000 for working capital and development expenses; and $38,372 for organization, promotional, financing and general expenses; and salaries until operation is begun. *Re Southern Ill. Gas Co.*, III [illegible] P. U. C. 192, 574, P. U. R. 1916-C 704.

21. Approval of Securities Issues—Application of Proceeds—Indebtedne a Year or Less—Franchises Not to be Capitalized.

§ 21. Subject to the provisions of this Act and of the order c Commission issued as provided in this Act, a public utility may stocks and stock certificates, and bonds, notes and other evidences debtedness payable at periods of more than twelve months after the thereof, for the following purposes and no others, namely: For th quisition of property, or for the construction, extension or improve of or addition to its facilities, or for the discharge or lawful refu of its obligations; or for the reimbursement of moneys actually exp from income or from any other moneys in the treasury of the p utility not directly or indirectly secured by or obtained from the of stocks or stock certificates, or bonds, notes or other evidences debtedness of such public utility, within five years next prior to the of an application with the Commission for the required authoriz for any of the aforesaid purposes except maintenance of servic placements and substitutions in cases where the applicant shall kept its accounts and vouchers for such expenditures in such m as to enable the Commission to ascertain the amount of moneys pended and the purposes for which such expenditures were made the sources of the funds in the treasury of the public utility a to such expenditures: *Provided*, that such public utility, in ad to the other requirements of law, shall first have secured from the mission an order authorizing such issue and stating the amount th and the purpose or purposes to which the issue or the proceeds th are to be applied, and that, in the opinion of the Commission, the m property or labor to be procured or paid for by such issue is rea required for the purpose or purposes specified in the order, and th cept as otherwise permitted in the order in the case of notes or evidences of indebtedness, such purpose or purposes are not, in or in part, reasonably chargeable to operating expenses or to in To enable it to determine whether it will issue such order, the mission shall hold a hearing and may make such additional inqu investigation, and examine such witnesses, books, papers, acc documents and contracts and require the filing of such data as it deem of assistance. The public utility may be required by the mission to disclose every interest of the directors of such public in any transaction under investigation. The Commission shall power to investigate all such transactions and to inquire int good faith thereof, to examine books, papers, accounts, document contracts of public utilities, construction or other companies or of or individuals with whom the public utility shall have had fin transactions, for the purpose of enabling it to verify any state furnished, and to examine into the actual value of property acquir or services rendered to such public utility. Before issuing its ord Commission, when it is deemed necessary by the Commission, make an adequate physical valuation of all property of the public u but a valuation already made under proper public supervision m adopted, either in whole or in part, at the discretion of the Commi and shall also examine all previously authorized or outstanding

ties of the public utility, and fixed charges attached thereto. A statement of the results of such physical valuation, and a statement of the character of all outstanding securities, together with the conditions under which they are held, shall be included in the order. The Commission may require that such information or such part thereof as it thinks proper, shall appear upon the stock, stock certificate, bond, note or other evidence of indebtedness authorized by its order. The Commission may by its order grant permission for the issue of such stock certificates, or bonds, notes or other evidences of indebtedness in the amount applied for, or in a lesser amount, or not at all, and may attach to the exercise of its permission such condition or conditions as it may deem reasonable and necessary. The Commission may also require the public utility to compile for the information of its shareholders such facts in regard to its financial transactions, in such form as the Commission may direct.

No public utility shall, without the consent of the Commission, apply the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any proceeds thereof, to any purpose not specified in the Commission's order or to any purpose specified in the Commission's order in excess of the amount authorized for such purpose, or issue, or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof. The Commission shall have the power to require public utilities to account for the disposition of the proceeds of all stocks and stock certificates, and bonds, notes and other evidences of indebtedness, in such form and detail as it may deem advisable, and to establish such rules and regulations as it may deem reasonable and necessary to insure the disposition of such proceeds for the purpose or purposes specified in its order.

A public utility may issue notes, for proper purposes and not in violation of any provision of this Act or any other Act, payable at periods of not more than twelve months after the date of issuance of the same, without the consent of the Commission; but no such note shall, in whole or in part, be renewed from time to time without the consent of the Commission for an aggregate period of longer than two years, or be refunded by any issue of stocks and stock certificates, or of bonds, notes of any term or character or any other evidence of indebtedness, without the consent of the Commission.

The Commission shall have no power to authorize the capitalization of the right to be a corporation, or to authorize the capitalization of any franchise, license, or permit whatsoever or the right to own, operate or enjoy any such franchise, license, or permit, in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as the consideration for the grant of such franchise, license, permit or right; nor shall any contract for consolidation or lease be capitalized, nor shall any public utility hereafter issue any bonds, notes or other evidences of indebtedness against or as a lien upon any contract for consolidation or merger.

NOTE.—*See Re Illinois Northern Utilities Co. et al.*, III I. P. U. C. 107, P. U. R. 1917-A 816.

Re Illinois Central R. Co., II I. P. U. C. 148, P. U. R. 1915-D 1032; *Re New York Central R. Co.*, II I. P. U. C. 607 abstracted, P. U. R. 1915-D 1024; *Re Tyrone Elec. Co.*, III I. P. U. C. 140, P. U. R. 1916-E 708; *Re Southern Illinois Gas Co.*, III I. P. U. C. 579 abstracted, P. U. R. 1916-C 704; *Re Illinois Northern Utilities Co.*, III I. P. U. C. 107, P. U. R. 1917-A 816.

22. Consolidation and Reorganization—Capitalization.

§ 22. The capitalization of a public utilities formed by a merger or consolidation of two or more corporations shall be subject to the approval of the Commission, but in no event shall the Commission approve a capitalization exceeding the sum of the capital stock of the corporations so consolidated, at the par value thereof, and any additional sum actually paid in cash for improvements; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger. In any reorganization of a public utility, resulting from forced sale, or in any other manner, the amount of capitalization, including therein all stocks and stock certificates and bonds, notes, and other evidences of indebtedness, shall be such as is authorized by the Commission, which in making its determination, shall not exceed the fair value of the property involved. Issuance of stocks and stock certificates, and bonds, notes or other evidences of indebtedness in connection with any consolidation, merger, or reorganization shall be subject to all the terms of sections 20 and 21 of this Act.

NOTE.—See *Re Illinois Northern Utilities Co.* et al., III I. P. U. C. 107, 1917-A 816, holding that the Commission need not determine the value of the property of constituent companies in order to authorize a stock issue by the consolidated companies for the purpose of effecting the consolidation, provided the proposed issue of securities does not exceed the sum of the par value of the outstanding securities of the constituent companies; but the Commission may require that the securities recite that the authorization shall not be taken as a finding of value.

23. Securities Unlawfully Issued.

§ 23. All stock and every stock certificate, and every bond, note or other evidence of indebtedness, of a public utility, not payable within twelve months issued without an order of the Commission authorizing the same then in effect shall be void, unless issued upon the authority of any articles of incorporation or amendments thereto, and of a vote of the stockholders or directors, filed and taken before this Act becomes a law, and likewise all stock and every stock certificate, and every bond, note or other evidence of indebtedness of a public utility not payable within twelve months, issued with the authorization of the Commission but not conforming in its provisions to the provisions, if any, which it is required by the order of authorization of the Commission to contain, shall be void; but no failure in any other respect to comply with the terms or conditions of the order of authorization of the Commission shall render void any stock or stock certificate, or any bond, note or other evidence of indebtedness, except as to a corporation or person taking the same with notice of the failure to comply with the order of the Commission.

NOTE.—See Conference Rule No. 23, III I. P. U. C. 11.

24. Penalty for Unlawfully Issuing Securities.

§ 24. Every public utility which, directly or indirectly, issues or causes to be issued, any stock, stock certificate, bond, note or other evidence of indebtedness, in non-conformity with the order of the Commission authorizing the same, or contrary to the provisions of this Act, or which applies the proceeds from the sale thereof, or any part thereof, to any purpose other than the purpose or purposes specified in the Commission's order, as herein provided, or to any purpose specified in the Commission's order in excess of the amount authorized for such purpose, shall upon conviction, be subject to a penalty of not less than five hundred dollars ($500) nor more than twenty thousand dollars ($20,000) for each offense.

25. Penalty for False Statement, Etc.

§ 25. Every officer, agent or employee of a public utility, and every other person who knowingly authorizes, directs, issues or executes, causes to be issued or executed, or aids in the issue or execution of any stock, stock certificate, bond, note or other evidence of indebtedness, in non-conformity with the order of the Commission authorizing the same, or contrary to the provisions of this Act; or who, in any proceeding before the Commission, knowingly makes any false statement or representation, or with the knowledge of its falsity files or causes to be filed with the Commission any false statement or representation, which said statement or representation so made, filed or caused to be filed may tend in any way to influence the Commission to make an order authorizing the issue of any stock or stock certificate, or any bond, note or other evidence of indebtedness, or which results in procuring from the Commission the making of any such order, or who, with knowledge that any false statement or representation was made to the Commission, in any proceeding, tending in any way to influence the Commission to make such order, issues or executes or negotiates, or causes to be issued, executed, or negotiated any such stock or stock certificate, or bond, note or other evidence of indebtedness, or who, directly or indirectly, knowingly applies, or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificate, or bond, note or other evidence of indebtedness, to any purpose not specified in the Commission's order or to any purpose specified in the Commission's order in excess of the amount authorized for such purpose, or who, with knowledge that any stock certificate, or bond, note or other evidence of indebtedness, has been issued or executed in violation of any of the provisions of this Act, negotiates, or causes the same to be negotiated, shall, on conviction thereof, be imprisoned in the State penitentiary for a term of not less than two years and not more than ten years.

26. No Guaranty of Utility Securities by State.

§ 26. No provision of this Act, and no deed or act done or performed under or in connection therewith, shall be held or construed to obligate the State of Illinois to pay or guarantee, in any manner whatsoever, any stock or stock certificate, or bond, note or other evidence of indebtedness, authorized, issued or executed under the provisions of this

Act; nor shall it be held or construed to imply any validation or approval by the State of past issues, nor that past or future or past and future issues represent actual value of property owned or to be owned by a public utility or the value of such property owned or to be owned by a public utility or the value of such property for rate-making purposes.

NOTE.—*Re Illinois Northern Utilities Co. et al.*, III I. P. U. C. 107, P. U. R. 1917-A 816 where the Commission required a consolidated utility issuing securities not in excess of the total par value of those of the constituent companies to recite in such securities that the authorization did not amount to a finding of value.

27. Intercorporate Relations—Approval of Contracts and Leases.

§ 27. Unless the consent and approval of the Commission is first obtained:

(a) No two or more public utilities may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other;

(b) No public utility may purchase, lease, or in any other manner acquire, control, direct or indirect, over the franchises, licenses, permits plants, equipment, business, or other property of any other public utility;

(c) No public utility may assign, transfer, lease, mortgage, sell, or otherwise dispose of or encumber the whole or any part of its franchises, licenses, permits, plant equipment, business, or other property; but this shall not be construed to prevent the sale, lease, assignment or transfer by any public utility of any tangible personal property which is not necessary or useful in the performance of its duties to the public;

(d) No public utility may by any means, direct or indirect, merge or consolidate its franchises, licenses, permits, plants, equipment, business, or other property with that of any other public utility;

(e) No public utility may purchase, acquire take or receive any stock, stock certificates, bonds, notes or other evidences of indebtedness of any other public utility. But with the consent and approval of the Commission, a public utility may purchase, acquire, take, or hold stock, stock certificates, bonds, notes or other evidences of indebtedness of another public utility.

The proceedings for obtaining the authorization of the Commission provided for in this section shall be as follows: There shall be filed with the Commission a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, or by the person or company, as the case may be, clearly setting forth the object and purposes desired, and setting forth the full and complete terms of the proposed assignment, transfer, lease, mortgage purchase, sale, merger, consolidation, contract or other transaction, as the case may be. Upon the filing of such petition, the Commission shall, if it deems necessary, fix a time and place for the hearing thereon. After such hearing, or in case no hearing is required, if the Commission is satisfied that such petition should reasonably be granted, and that the public will be convenienced thereby, the Commission shall make such order in the premises as it may deem proper and as the circumstances may require, attaching such conditions as it may deem proper, and thereupon it shall be lawful to do the things provided for in such order

The Commission shall impose such conditions as will protect the interests of minority and preferred stockholders.

Every assignment, transfer, lease, mortgage, sale, or other disposition or encumbrance of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof, and every contract, purchase or stock, or other transaction referred to in this section, made otherwise than in accordance with an order of the Commission authorizing the same, except as provided in this section shall be void.

NOTE.—The Commission has jurisdiction over all intercorporate contracts between utilities. *Re Quincy Gas, Elec. & H. Co. et al.*, III I. P. U. C. 98.

See also *Western Illinois Teleph. Co. et al.*, V I. P. U. C. 1; *Stark County Power Co. et al.*, V. I. P. U. C. 63, P. U. R. 1918-A 224; *Public Utilities Comm.* v. *Xenia Elec. L. Co.*, V I. P. U. C. 547.

Section 27 of the Act is not in violation of section 22 of Act IV of the State constitution. *State Public Utilities Comm. ex rel. Klaw et al.* v. *Romberg* 275 Ill. 432.

As to the exercise of the Commission's jurisdiction over leases see *Re Chicago Telegh. Co.*, II I. P. U. C. 676 abstracted, P. U. R. 1915-A 596; *Re Sidel & Olney E. Co.*, III I. P. U. C., 625 abstracted; etc.

As to the exercise of the Commission's jurisdiction over the purchase and sale of utilities see *Re Public Service Co. of N. Illinois et al.*, II I. P. U. C. 120, P. U. R. 1915-B 353; *Re Receivers Central Union Teleph. Co. et al.*, III I. P. U. C. 127; *Re Tyrone Elec. Co. et al.*, III I. P. U. C. 140, P. U. R. 1916-E 708; *Re Coon Bros Teleph. Co. et al.*, V I. P. U. C. 302; etc.

A telephone company, under this section of the Act, has no right, unless the consent of the Commission is first obtained, to disconnect the lines of another company from the lines of a third company and connect them with its own, even though the second had never merged with the third company but had in fact, maintained a separate and distinct organization of its own and had never parted with the ownership of its lines and equipment. *Thompson* v. *Pearl City Ind. Teleph. Co.*, II I. P. U. C. 85, P. U. R. 1915-B 950.

28. Transfer of Franchise or License—Foreign Corporations—Application of Law to.

§ 28. No franchise, license, permit or right to own, operate, manage or control any public utility, except common carriers engaged in interstate commerce and except telegraph or telephone companies engaged in interstate commerce, shall be hereafter granted or transferred to any grantee or transferee other than a corporation duly incorporated under the laws of this State.

No public utility shall be in any manner exempt from the provisions of this Act because or by virtue of the fact that it may be or may have been incorporated or organized under the laws of another state, or of the United States, or of a foreign country. (As amended June 26, 1917.)

NOTE.— *State Public Utilities Comm. ex rel. Klaw et al.* v. *Romberg* 275 Ill. 432.

29. Transfer of Franchises—Approval of.

§ 29. No franchise, license, permit or right to own, operate, manage or control any public utility shall be assigned, transferred or leased nor shall any contract or agreement with reference to or affecting any such franchise, license, permit or right be valid or of any force or effect whatsoever, unless such assignment, lease, contract or agreement shall have been approved by the Commission. Such permission shall not be construed to revive or validate any lapsed or invalid franchise, license, permit or right, or to enlarge or add to the powers and privileges contained in the grant of any franchise, license, permit or right, or to waive any forfeiture.

NOTE.—The assignment of a franchise by one telephone company to another without the consent and approval of the Commission as provided by this section

does not carry with it any right to install, operate or maintain a telephone exchange by the assignee. *Pitcher Teleph. CO.* v. *Steele Teleph. Co.*, II I. P. U. C. 112, P. U. R. 1915-B 654.

30. Valuation of Utility Property.

§ 30. The Commission shall have power to ascertain the value of the property of every public utility in this State and every fact which in its judgment may or does have any bearing on such value. In making such valuation the Commission may avail itself of any information, books, documents, or records in the possession of any officer, department or board of the State or any subdivision thereof. The Commission shall have power to make revaluation from time to time and also to ascertain the value of all new construction, extensions, and additions to the property of every public utility.

VALUATION IN GENERAL.

Lake Forest v. *Lake Forest Water Co.*, II I. P. U. C. 570, P. U. R. 1915-D 1008; *City of Belleville* v. *St. Clair County Gas & Elec. Co.*, II I. P. U. C. 346, P. U. R. 1915-F 235, P. U. R. 1915-F 783, P. U. R. 1916-B 24; *City of Springfield* v. *Springfield Gas & Elec. Co.*, III I. P. U. C. 324, P. U. R. 1916-C 281; *Re De Kalb County Teleph. Co.*, III I. P. U. C. 432; *Re Bucher*, III I. P. U. C. 449, P. U. R. 1916-F 501; *Woll* v. *Hullinger*, III I. P. U. C. 463, P. U. R. 1916-D 380; *City of Lincoln* v. *Lincoln Water & Light Co.*, IV I. P. U. C. 574, P. U. R. 1917-B 1; *Re Chicago North Shore & M. R. Co.*, IV I. P. U. C. 717, P. U. R. 1918-A 388; *City of Pekin* v. *Pekin Water Works Co.*, IV I. P. U. C. 784, P. U. R. 1917-C 838; *Pierce* v. *Citizens' Gas, Elec, & H. Co.*, V I. P. U. C. 340; *City of Peoria* v. *Central Union Teleph. Co.*, V I. P. U. C. 505, P. U. R. 1918-E 74; etc.

The Commission may give a higher value to the property of a utility than that fixed by the utility company itself. *Re Oblong Gas Co.*, III I. P. U. C. 401, P. U. R. 1915-A 598.

31. Fees for Issuance of Stocks and Bonds.

§ 31. The Commission shall charge every public utility receiving permission under this Act for the issue of bonds, notes and other evidences of indebtedness an amount equal to ten cents for every hundred dollars of such securities authorized by the Commission, and the same shall be paid into the State treasury before any such securities shall be issued. *Provided* that no public utility shall be required to pay any fee for permission granted to it by any such commission in any of the following cases:

(1) To guarantee bonds or other securities.

(2) To issue bonds, notes or other evidences of indebtedness issued for the purpose of converting, exchanging, taking over, refunding, discharging or retiring any bonds, notes or other evidences of indebtedness except:

(a) When issued for an aggregate period of longer than two years for the purpose of converting, exchanging, taking over, refunding, discharging or retiring any note, or renewals thereof, issued without the consent of such State Public Utilities Commission of Illinois or such Public Utilities Commission.

(b) When issued for the purpose of converting, exchanging, taking over, refunding, discharging or retiring bonds, notes or other evidences of indebtedness issued prior to January 1, 1914, and upon which no fee has been previously paid. (As amended June 29, 1917.)

NOTE.—Provisions of this section applied in *Re Chicago Great Western R. Co.*, II I. P. U. C. 598, P. U. R. 1915-A 800; *Re Peoria Ry.*, II I. P. U. C. 604, P. U. R. 1915-A 804; etc.

ARTICLE IV.

RATES AND SERVICE—ACCIDENTS.

32. General Duties of Public Utilities.

§ 32. All rates or other charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.

Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and the public and as shall be in all respects adequate, efficient, just and reasonable.

All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

NOTE.—See General Order No. 30, IV I. P. U. C. 10; *Western Union Teleg. Co. v. Chicago Teleph. Co. et al.*, IV I. P. U. C. 92; *Cook v. Public Service Co. of N. Illinois*, IV I. P. U. C. 321, P. U. R. 1917-E 53; *Village of Palestine* v. *Oblong Gas Co.*, V I. P. U. C. 10. Conference Rule No. 13.

New York Central R. Co. v. *Stevenson* 277 Ill. 474 holds that this section repeals by implication so far as public utility corporations are concerned, the former statutory provisions for the payment of fees for issuance of or for increasing the capital stock of corporations; that under the provisions of the Public Utilities Act the fees for issuing capital stock of public utilities should be paid to the Commission and not to the Secretary of State.

See also *State Public Utilities Comm.* v. *Chicago, M. & St. P. Ry. Co.*, 287 Ill. 412, 417.

RATES, IN GENERAL.

The Commission by issuing an order requiring a utility to file a rate schedule does not in any way fix the rates to be charged by the company even though such order is preliminary to an order fixing rates. *State Public Utilities Comm.* v. *Monarch Refrigerating Co.*, 267 Ill. 528.

The Commission has power to regulate rates for transportation between two points within the State which is purely local in character, although the carrier may perform similar services with respect to interstate transportation. *Chicago M. & St. P. R. Co.* v. *State Public Utilities Comm.*, 268 Ill. 49.

It is not the general policy of the Commission to inquire, on its own initiative, into the reasonableness of a contract for service between municipalities and utilities entered into prior to the taking effect of the Public Utilities Act. *Re Tampico Farmers' Mut. Teleph. Co.*, II I. P. U. C. 740, P. U. R. 1915-A 24.

Upon the application of a telephone company for permission to change its rates to eliminate discrimination in favor of stockholders, and to increase its revenue, the Commission will not consider the effect of the proposed charge upon the revenues of a competing company. *Re Calhoun Farmers' Co-op. Teleph. Co.* II I. P. U. C. 508, P. U. R. 1915-C 93.

A retroactive reduction in rates cannot be made without an order of the Commission. *Re Central Illinois Public Service Co.*, III I. P. U. C. 295, P. U. R. 1916-B 922.

Electric rates cannot be shown to be excessive merely by comparison with rates in another village having three times the population and nine times the consumption and revenue. *McClanahan* v. *Tri-County L. & P. Co.*, III I. P. U. C. 477, P. U. R. 1916-D 187.

The Commission ordered a reduction in electric rates although the company was not making a fair return, where it appeared that increased consumption would follow such a reduction. *Woll* v. *Hullinger* III I. P. U. C. 463, P. U. R. 1916-D 380.

Rates increased before the effective date of the Public Utilities Act may be filed after that date without the consent of the Commission. *State Public Utilities Comm. ex rel. Mitchell* v. *Chicago & W. T. R. Co.*, 275 Ill. 555.

A rate fixed by the Commission after a hearing must be based upon the evidence presented to the Commission. *State Public Utilities Comm.* v. *Atchison T. & S. Fe. R. Co.*, 279 Ill. 194.

On a complaint against the reasonableness of rates increased before but filed after the effective date of the Public Utilities Act the Commission is without power to order a return to the old fares pending a determination of the reasonableness of the new. *State Public Utilities Comm. ex rel Mitchell* v. *Chicago & W. T. R. Co.*, 275 Ill. 555

The Commission has no power to suspend rates before the hearing and taking of evidence where they had been duly filed with the Railroad and Warehouse Com-

mission and were lower than the maximum prescribed by law *State Public*
ities Comm. v. *Atchison T. & St. Fe. R. Co.*, 279 Ill. 194.

The Commission may require the establishment of joint freight rates be
any two points in the State although the services rendered by the intermedia
delivering carriers are wholly within the switching district of a city, wh
appears that the movement in some instances may be nearly as great a
covered by a line haul. *State Public Utilities Comm. ex rel. Am. Sand*
Chicago & Northwestern Ry. Co., 279 Ill. 110.

The Maximum Fare Law does not prevent the Commission from fixing
less than two cents a mile for a company organized under the Railroad Act.
Public Utilities Comm. ex rel. Mitchell v. *Chicago & W. T. Ry. Co.*, 275 Ill. 55

The Public Utilities Act is not unconstitutional in granting the Comm
power to fix street railway fares. *State Public Utilities Comm. ex rel. Mitc*
Chicago & W. T. Ry. Co., 275 Ill. 555.

The provisions of the Public Utilities Act requiring a hearing before rat
be increased are not applicable to the first rate schedule filed by a utility. *D*
Teleph. Co. v. *Carlock Farmers' Teleph. Co.* V I. P. U. C. 16, P. U. R. 1918-

SERVICE, IN GENERAL.

The Commission has power to require a railroad to construct and maint
depot in any town or village of 200 or more inhabitants. *State Public U*
Comm. ex rel. Beck v. *Toledo, St. L. & W. R. Co.*, 267 Ill. 93.

The Commission has authority to permit a utility to discontinue service
Central Ill. Public Service Co., III I. P. U. C. 93, P. U. R. 1916-B 920; etc.

The Commission has no power to require an electric consumer to repa
maintain his service line connecting with a transmission line. *Abbott L. &*
v. *Parks*, III I P. U. C. 96, P. U. R. 1916-D 1093.

The Public Utilities Act is not unconsitiutional in that it grants the
mission power to regulate street car service within a municipality. *Chica*
O'Connell et al. 278 Ill. 591.

The Commission has no power to regulate the practice of passengers boa
street cars in dirty working clothing and without washing their hands or
State Public Utilities Comm. v. *Centralia Trac. Co.*, IV I. P. U. C. 154, P.
1917-F 806.

ACCIDENTS, IN GENERAL.

State Public Utilities Comm. v. *Chicago M. Elec. R. Co.*, III I. P. U. C.
State Public Utilities Comm. v. *Illinois Midland Ry. Co.*, III I. P. U. C. 253

33. Filing Schedule of Rates.

§ 33. Every public utility shall file with the Commission and
print and keep open to public inspection schedules showing all rates
other charges, and classifications, which are in force at the time for
product or commodity furnished or to be furnished by it, or for
service performed by it, or for any service in connection therewit
performed by any public utility controlled or operated by it. E
public utility shall file with and as a part of such schedule and
state separately all rules, regulations, terminal, icing, storage or
charges, privileges and contracts that in any manner affect the
charged or to be charged for any service. Such schedule shall be
for all services performed wholly or partly within this State, and
rates and other charges and classifications shall not, without the con
of the Commission, exceed those in effect on July 1, 1913. But not
in this section shall prevent the Commission from approving or fi
rates or other charges or classifications from time to time, in excess
less than those shown by said schedules.

Where a schedule of joint rates or other charges, or classificat
is or may be in force between two or more public utilities such sched
shall in like manner be printed and filed with the Commission, an
much thereof as the Commission shall deem necessary for the use of
public shall be filed in every station or office of such public utilit
accordance with the terms of section 34 of this Act. Unless other
ordered by the Commission a schedule showing such joint rates or o
charges, or classification need not be filed with the Commission by
than one of the parties to it: *Provided*, that there is also filed with

Commission a concurrence in such schedule by each of the other parties thereto.

Every public utility shall file with the Commission copies of all contracts, agreements or arrangements with other public utilities, in relation to any service, product or commodity affected by the provisions of this Act, to which it may be a party, and copies of all other contracts, agreements or arrangements with any other person or corporation affecting in the judgment of the Commission the cost to such public utility of any service, product or commodity.

NOTE.— *Cook* v. *Public Service Co. of N. Illinois*, IV I. P. U. C. 321, P. U. R. 1917-E 53; *Village of Palestine* v. *Oblong Gas Co.*, V I. P. U. C. 10.
This section authorizes the Commission to determine and fix rates and charges for all services performed by public utilities in Illinois subject to the Act. *State Public Utilities Comm.* v. *Monarch Refrig. Co.*, 267 Ill. 528.

34. Publication and Posting of Schedules.

§ 34. Subject to such rules and regulations as the Commission may prescribe, the schedules referred to in section 33 shall be plainly printed, mimeographed or typewritten in large type, and a copy thereof shall be posted or kept on file in every station or office of a public utility where the public transacts business with such public utility. Any or all of such schedules kept as aforesaid shall be immediately produced by such public utility for inspection upon the demand of any person. A notice printed in bold type, in size prescribed by the Commission, stating that such schedules are on file with the agent and open to inspection by any person, and that the agent will assist any person to determine from such schedules any rates or other charges, classification, rules or regulations in force, shall be kept posted by the public utility in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the Commission and shall conform in the case of common carriers subject to the Act of Congress entitled, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the Acts amendatory thereof and supplementary thereto, as nearly as may be, to the form of schedules and manner of posting prescribed by the Interstate Commerce Commission under said Act: *Provided,* that in lieu of filing its entire schedule in each station or office, any public utility may, subject to the regulations of the Commission, file or keep posted at such station or office, schedules of such rates or other charges, classifications, rules and regulations relating thereto, as are applicable at, to and from the place where such office is located.

The Commission may determine and prescribe the form in which the schedules required by this Act to be filed with the Commission and to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time if it shall be found expedient; *Provided, however,* that the Commission shall endeavor to have such form or forms prescribed by it conform so far as practicable to any similar form or forms prescribed by the Interstate Commerce Commission.

NOTE.—See Conference Rule No. 23, III I. P. U. C. 11.

35. No Service to be Rendered Until Schedules Filed.

§ 35. No public utility shall undertake to perform any service or to furnish any product or commodity unless or until the rates and other charges and classifications, rules and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this Act: *Provided*, that in cases of emergency, a service, product or commodity not specially covered by the schedules filed, may be performed or furnished at a reasonable rate, which rate shall forthwith be filed and shall be subject to review in accordance with the provisions of this Act.

NOTE.—*Cook* v. *Public Service Co. of N. Illinois*, IV I. P. U. C. 321, P. U. R. 1917-E 53; Conference Rule No. 23, III I. P. U. C. 11; *Danvers Teleph. Co.* v. *Carlock Farmers' Teleph. Co.*, V I. P. U. C. 16.

36. Changes of Rates—Hearings.

§ 36. Unless the Commission otherwise orders, no change shall be made by any public utility in any rate or other charge or classification, or in any rule, regulation, practice or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, except after thirty days' notice to the Commission and to the public as herein provided. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules or supplements stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate or other charge, or classification, or in any rule, regulation, practice, or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, such proposed changes shall be plainly indicated on the new schedule filed with the Commission, by some character to be designated by the Commission, immediately preceding or following the item.

No public utility shall increase any rate or other charge, or so alter any classification, contract, practice, rule or regulation as to result in any increase in any rate or other charge, under any circumstances whatsoever, except upon a showing before the Commission and a finding by the Commission that such increase is justified.

Whenever there shall be filed with the Commission any schedule stating an individual or joint rate or other charge, classification, contract, practice rule or regulation, the Commission shall have power, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation, and pending the hearing and the decision thereon, such rate or other charge, classification, contract, practice, rule or regu-

lation shall not go into effect: *Provided*, that the period of suspension of such rate or other charge, classification, contract practice, rule or regulation shall not extend more than one hundred and twenty days beyond the time when such rate or other charge, classification, contract, practice, rule or regulation would otherwise go into effect unless the Commission, in its discretion, extends the period of suspension for a further period not exceeding six months. On such hearing the Commission shall establish the rates or other charges, classifications contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable. All such rates or other charges, classifications, contracts, practices, rules or regulations not so suspended shall, on the expiration of thirty days from the time of filing the same with the Commission, or of such lesser time as the Commission may grant, go into effect and be established and effective rates or other charges, classifications, contracts, practices, rules and regulations, subject to the power of the Commission, after a hearing had on its own motion or upon complaint, as herein provided, to alter or modify the same. Within thirty days after such changes have been authorized by the Commission, copies of the new or revised schedules shall be posted or filed in accordance with the terms of section 34 of this Act, in such a manner that all changes shall be plainly indicated.

NOTE.— The provision of section 36 that no change in rates shall go into effect pending a hearing by the Commission as to the reasonableness of the new rates does not apply to changes made when the first schedule is filed by a company. *State Public Utilities Comm. ex rel.* v. *Chicago & West Towns Ry. Co.*, 275 Ill. 555.

See *Re Rockford Elec. Co.*, IV I. P. U. C. 371, P. U. R. 1817-F 196; *Re Danvers Teleph. Co.* v. *Carlock Farmers Teleph. Co.*, V I. P. U. C. 16; *Re Public Service Co. of N. Illinois*, V I. P. U. C. 435, P. U. R. 1918-D 240; *Stein* v. *Chicago Teleph. Co.*, V I. P. U. C. 908; *Cook* v. *Public Service Co. of N. Illinois*, IV I. P. U. C. 321, P. U. R. 1917-E 53.

Rate changes were ordered to eliminate discrimination in favor of stock holders in *Re Calhoun Farmer's Co-operative Teleph. Co.*, II I. P. U. C. 508, P. U. R. 1915-C 93; *Re Citizens Mutual Teleph. Co.*, II I. P. U. C. 510, P. U. R. 1915-C 99; *Re St. Peter Teleph. Co.*, II I. P. U. C. 496, P. U. R. 1915-B 350; *Re Montrose Mutual Teleph. Co.*, II I. P. U. C. 737, P. U. R. 1915-A 33; *Re Tampico Farmer's Mutual Teleph. Co.*, II I. P. U. C. 740, P. U. R. 1915-A 24; *Re Tri-County Teleph. Co.*, II I. P. U. C. 738, P. U. R. 1915-A 129; etc.

Rate changes were ordered to eliminate discrimination in favor of the owners of equipment in *Re Strawn Teleph. Co.*, II I. P. U. C. 740, P. U. R. 1915-C 97; *Re Farmer's Mutual Exch. of Wapella*, II I. P. U. C. 740, P. U. R. 1915-B 214; *Re St. Peter Teleph. Co.*, II I. P. U. C. 496, P. U. R. 1915-B 350; *Re Tamaroa Teleph. Co.*, II I. P. U. C. 740, P. U. R. 1915-B 662; *Re Tampico Farmer's Mutual Teleph. Co.*, II I. P. U. C. 740, P. U. R. 1915-A 24; *Re Tri-County Teleph. Co.*, II I. P. U. C. 738, P. U. R. 1915-A 129; etc.

See also *State Public Utilities Comm. ex rel. Farmers Ill. Grain Dealers Assn. et al.* v. *Atchison, Topeka & St. Fe. Ry. Co. et al.* 278 Ill. 58; *State Public Utilities Comm. ex rel. Turnbull* v. *Chicago, Peoria & St. Louis R. Co.*, 282 Ill. 158.

37. Charging More or Less Than Published Rate.

§ 37. Except as in this article otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, except as provided in section 35, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or

any facility or privilege except such as are regularly and uniformly tended to all corporations and persons.

NOTE.—See *Re Tampico Farmer's Mutual Teleph. Co.*, II I. P. U. C. 740, P R. 1915-A 24; *Re Citizen's Mutual Teleph. Co.*, II I. P. U. C. 510, P. U. R. 19 99; etc

See also *Hite* v. *Cincinnati, Indianapolis & W. R. Co.* 284 Ill. 297.

38. Discrimination Forbidden.

§ 38. No public utility shall, as to rates or other charges, servi facilities or in any other respect, make or grant any preference or vantage to any corporation or person or subject any corporation person to any prejudice or disadvantage. No public utility shall tablish or maintain any unreasonable difference as to rates or o charges, services, facilities, or in any other respect, either as betw localities or as between classes of service.

Every public utility shall, upon reasonable notice, furnish to persons who may apply therefor and be reasonably entitled ther suitable facilities and service, without discrimination and without de

NOTE.—*Stein* v. *Chicago Teleph. Co.*, V I. P. U. C. 908; *St. Clair County & Elec. Co. v. City of Belleville*, IV I P. U. C. 409, P. U. R. 1917-C 215.

See also *State Public Utilities Comm. ex rel. E. St. Louis Stone Co.* v. *Term R. Ass'n. of St. Louis et al.*, 281 Ill. 181.

39. Discrimination—Rebates—Free Transportation—Exchange of Transp tation for Advertising—Prior Transfer of Real Estate.

§ 39. No public utility, or any officer or agent thereof, or person acting for or employed by it, shall directly or indirectly, by device or means whatsoever, suffer or permit any corporation or per to obtain any service, commodity, or product at less than the rate other charge then established and in force as shown by the sched filed and in effect at the time. No person or corporation shall, dire or indirectly, by any device or means whatsoever, whether with or w out the consent or connivance of a public utility or any of its offic or employees, seek to obtain or obtain any service, commodity, or p duct at less than the rate or other charge then established and in fo therefor: *Provided, however,* that nothing in this Act contained sh be construed to prevent any railroad or transportation company fr selling or granting transportation or transportation privileges to owner or owners of any newspaper or magazine of general circulat in payment of or in exchange for advertising space in such newspa or magazine, at the full value thereof. *And, provided, further,* t nothing in this Act contained shall be construed to prevent the issua of free or reduced transportation by any street railroad corporation mail carriers, policemen and members of fire departments: *And, p vided, further,* that if prior to June 30, 1913, any real estate or ot tangible property shall have been sold or transferred to any pu utility or public service corporation, or, if before that date, any obligat of any public utility or public service corporation created in consid ation of the transfer to it of any real estate or other tangible prope shall have been released or cancelled, upon consideration in wh or in part of an agreement by such public utility or public service c poration expressed in writing to render any service, or furnish a commodity or product in the future to the party or parties making su

conveyance or transfer or owning such obligation, nothing in this Act contained shall be construed to in any wise affect such agreement or to prevent the performance or enforcement thereof according to its terms, or to authorize the Commission to interfere with such performance or enforcement. (As amended June 29, 1915 and 1919.)

NOTE.—*St. Clair County Gas & Elec. Co.* v. *City of Belleville*, V I. P. U. C. 409, P. U. R. 1917-C 215; *Re Exchange of Advertising for Transportation* I I P. U. C. 241.

40. Long and Short Haul—Common Carriers, Telephones, Telegraph, Etc.

§ 40. No common carrier subject to the provisions of this Act shall charge or receive any greater compensation in the aggregate for the transportation of persons or of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction within this State, the shorter being included within the longer distance, or charge any greater compensation as a through rate than the aggregate of the intermediate rates; but this shall not be construed as authorizing any such common carrier to charge or receive as great a compensation for a shorter as for a longer distance or haul. Upon application to the Commission, any common carrier may, in special cases, after investigation, be authorized by the Commission to charge less for a longer than for a shorter distance for the transportation of persons or property, and the Commission may from time to time prescribe the extent to which such carrier may be relieved from the operation and requirements of this section.

No telephone or telegraph company subject to the provisions of this Act shall charge or receive any greater compensation in the aggregate for the transmission of any long distance message or conversation for a shorter than for a longer distance over the same line or route in same direction, within the State, the shorter being included within the longer distance, or charge any greater compensation for a through service than the aggregate of the intermediate rates or tolls; but this shall not be construed as authorizing any such telephone or telegraph company to charge and receive as great a compensation for a shorter as for a longer distance. Upon application to the Commission, a telephone or telegraph company may, in special cases, after investigation, be authorized by the Commission to charge less for a longer than for a shorter distance service for the transmission of messages or conversations, and the Commission may from time to time prescribe the extent to which such telephone or telegraph company may be relieved from the operation and requirements of this section.

No other public utility shall without the consent of the Commission, charge or receive any greater compensation in the aggregate for a lesser commodity, product, or service than for a greater commodity, product or service of like character.

NOTE.—*Re Elgin Merchants' Light Co.*, III I. P. U. C. 509; *Re Central Il. Public Service Co.*, III I. P. U. C. 548; *Re Central Ill. Public Service Co.*, III I. P. U. C. 553; *Moline Sand Co* v. *Chicago B. & Q. R. Co.*, IV I. P. U. C. 100.

41. Commission to Fix Rates and Regulations.

§ 41. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges,

or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, contracts, or practices, or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof: *Provided*, that nothing in this section or Act shall be construed to repeal "An Act to establish and regulate the maximum rate of charges for the transportation of passengers by corporations or companies operating or controlling railroads in part or in whole in this State, and to provide penalties for the violation of the provisions thereof, and repealing all Acts and parts of Acts in conflict therewith," approved May 27, 1907, in force July 1, 1907.

NOTE.—*Re Public Service Co. of N. Illinois*, V. I. P. U. C. 435, P. U. R. 1918-D 240; *Rockford Elec. Co.*, IV I. P. U. C. 271, P. U. R. 1917-F 196.
See State Public Utilities Comm. ex rel. Mitchell et al. v. *Chicago & West Towns Ry. Co.*, 275 Ill. 555.

42. Control Over Joint Rates—Hearings.

§ 42. Whenever the Commission after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications in force over two or more common carriers, between any two points in this State, are unjust, unreasonable or excessive, or that no satisfactory through route or joint rate or other charge, or classification exists between such points, and that the public convenience and necessity demand the establishment of a through route and joint rate or other charge, or classification between such points, the Commission may order such common carriers to establish such through route and may establish and fix a joint rate or other charge, or classification which will be just and reasonable, to be followed, charged, enforced, demanded and collected in the future, and the terms and conditions under which such through route shall be operated. The Commission may order that freight moving between such points shall be carried by the different common carriers, parties to such through route and joint rate, without being transferred from the originating cars. In case the common carriers do not agree upon the division between them of the joint rates or other charges established by the Commission over such through routes, the Commission shall, after hearing, by supplemental order, establish such

vision. *Provided*, that where any railroad which is made a party to through route has itself over its own line and equally satisfactory rough route between the termini of the through route established, ch railroad shall have the right to require as its division of the joint te or other charge its local rate or other charge over the portion of its nes comprised in such through route, and the Commission may, in its scretion, allow to such railroad more than its local rate or other charge henever it will be equitable so to do: *And, provided*, that the shipper all have the right to route his freight whenever through rates shall ve been established either by the Commission or by the common rrier.

The Commission shall also have power, after a hearing had upon s own motion or upon complaint, to order any other public utilities to tablish and fix reasonable and sufficient joint rates or other charges, classifications. In case such public utilities do not agree upon the ivision between them of such joint rates or other charges the Comission shall, after hearing, establish such division by supplemental der.

NOTE.—*Moline Sand Co.* v. *Chicago B. & Q. R. Co.*, IV I. P. U. C. 106; *State blic Utilities Comm.* v. *Lebanon Tel. Exchange*, IV I. P. U. C. 329.
State Public Utilities Comm. ex rel. Am. Sand & Gravel Co. et al. v. *Chicago & W. Ry. Co.*, 279 Ill. 110 affirmed an order of the Commission requiring railway mpanies involved to establish joint rates on sand and gravel from points of igin to points within the Chicago switching district.

. Interstate Rates.

§ 43. The Commission shall have the power to investigate all xisting or proposed interstate rates or other charges, and classifications, nd all rules and practices in relation thereto, of any public utility, here any Act in relation thereto shall take place within this State; and hen the same are, in the opinion of the Commission, excessive or discriminatory or in violation of the Act of Congress entitled, "An Act to egulate commerce," approved February fourth, eighteen hundred and ighty-seven, and the Acts amendatory thereof and supplementary hereto, or of any other Act of Congress, or in conflict with the rulings, rders or regulations of the Interstate Commerce Commission, the Commission may apply by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction for relief.

4. Interchange of Traffic or Service—Joint Rates.

§ 44. Every common carrier shall afford all reasonable, proper and qual facilities for the prompt and efficient intercharge and transfer of assengers, tonnage and cars, loaded or empty, between the lines owned, perated, controlled or leased by it and the lines of every other common arrier, and shall make such interchange and transfer promptly without liscrimination between shippers, passengers or carriers either as to ompensation charged, service rendered or facilities afforded. Every ailroad company shall receive from every other railroad company aving the same gauge track, at any point of connection, freight cars f proper standard and in proper condition, and shall haul the same ither to destination, if the destination be upon a line owned, operated r controlled by such railroad company, or to point of transfer accord-

ing to route billed, if the destination be upon the line of some other railroad company. But nothing in this Act shall be construed as requiring any common carrier to give the use of its terminal facilities to another common carrier engaged in like business.

Every telephone company and telegraph company operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations and messages of every other telephone or telegraph company with which a joint rate has been established or with whose line a physical connection may have been made.

NOTE.—*Alton Bd. of Trade v. Cleveland, C. C. & St. L. Ry. Co.*, III I. P. U. C. 282; *Plymouth Mutual Teleph Co. v. Farmers Mutual Teleph, or Switchboard Co.*, IV I. P. U. C. 333, P. U. R. 1917-E 464; *E. St. Louis, C. & Waterloo Ry. Co. v. Pittsburgh C. C. & St. L. Ry. Co.*, V I. P. U. C. 420, P. U. R. 1918-E 654.

See also *State Public Utilities Comm. ex rel. Alton Bd. of Trade* v. *Cleveland, C. C. & St. Louis Ry. Co.* 285 Ill. 184; *State Public Utilities Comm. ex rel. Am. Sand & Gravel Co. et al.* v. *Chicago & N. W. Ry. Co.*, 279 Ill. 110.

45. Side Track Connections—Jurisdiction Over.

§ 45. Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: *Provided*, that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby.

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that application has been made by any corporation or person to a railroad company for a connection or spur as provided in this section, and that the railroad company has refused to provide such connection or spur and that the applicant is entitled to have the same provided for him, the Commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the Commission shall have the power to prescribe. Whenever any such connection or spur has been so provided, any corporation or person shall be entitled to connect with the track, tracks or railroad thereby connected with the railroad of the railroad company and to use the same or to use the spur so provided upon payment to the party or parties incurring the primary expense of such track, tracks or railroad, or the connection therewith or of such

of a reasonable proportion of the cost thereof to be determined by Commission after notice to the interested parties and a hearing on: *Provided,* that such connection and use can be made without asonable interference with the rights of the party or parties in- ng such primary expense. The Commission shall likewise have the r to require one railroad company to switch to private spurs and strial tracks upon its own railroad the cars of a connecting railroad any and to prescribe the terms and compensation for such service.

OTE.—*Haskins Coal Co.* v. *Chicago & E. Illinois R. Co.*, III I. P. U. C. 304; *Coal Co.* v. *Louisville & Nashville R. Co.*, IV I. P. U. C. 103.
Farmers' Elevator Co. of Yorkville et al v. *Chicago R. I. & Pac. Ry. Co.*, 226 7 holds that the Commission must hold a public hearing and take evidence, all parties interested a chance to present their case before a physical con- ns between two railways can be compelled.
ee also *State Public Utilities Comm. ex rel. Cameron* v. *Lake Erie & W. R.* 77 Ill. 574 sustaining Commn's. order directing the railroad to reconstruct a track.

Tracks—Physical Connections.

§ 46. Whenever the Commission shall find, after a hearing made complaint or upon its own motion, that the public convenience and sity would be subserved by having track connections made, between two or more railroads or between any two or more street railroads, Commission shall order and such railroads or street railroads of the or similar gauge to make physical connection at any and all cross- and at all points where a railroad shall begin or terminate at or any other railroad, and at all towns or cities where two or more oads enter the limits of the same, so that the cars of any such rail- company may be speedily transferred from one railroad to another, shall order whether the expense thereof shall be borne jointly or wise.

Telephone and Telegraph—Physical Connections.

§ 47. Whenever the Commission, after a hearing had upon its own on or upon complaint, shall determine that public convenience and sity require a physical connection for the establishment of a con- ous line of communication between any two or more public utilities ne conveyance of messages or conversations, the Commission may, by , require that such connection be made. If such public utilities do agree upon the division between them of the cost of such physical ection or connections, the Commission shall have authority, after er hearing, to establish such division by supplemental order.

OTE.—*State Public Utilities Comm.* v. *Lebanon Teleph. Exchange* IV I. P. U. ; *Citizens of Aledo v. People's Teleph. Co. and Home Mutual Teleph. Co.*, P. U. C. 43; *Galesburg Union Teleph. Co. v. Farmington. Co.*, III I. P. U. C. P. U. R. 1916-E 460; etc

Joint Use of Facilities.

§ 48. Whenever the Commission, after a hearing had upon its own on or upon complaint, shall find that public convenience and neces- require the use by one public utility of the conduits, subways, tracks, , poles, pipes or other property or equipment, or any part thereof, ver or under any street or highway, belonging to another public y, and that such use will not prevent the owner or other users of from performing their public duties nor result in irreparable y to such owner or other users of such conduits, subways, tracks,

wires, poles, pipes or other property or equipment, or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the Commission may, by order, direct that such use be permitted and prescribe a reasonable compensation and reasonable terms and conditions for such joint use. If such use be directed, the public utility to whom the use is permitted shall be liable to the owner or other users of such conduits, subways, tracks, wires, poles, pipes or other property or equipment, for such damage as may result therefrom to the property of such owner or other users thereof: *Provided*, that nothing in this section shall be construed to extend the jurisdiction of the Commission over the joint use of such facilities of public utilities mainly or primarily within a city and subject to the jurisdiction of such city.

NOTE.—See General Order No 30, Sec. 6, P. U. R. 1917-A 872 for rules for electrical construction for jointly used pole lines. See also, *Re Cumberland Teleph. & Teleg. Co.*, III I. P. U. C. 611; etc.

49. Facilities—Power of Commission to Require Adequate Facilities.

§ 49. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed and shall fix the same by its order, decision, rule or regulation. The Commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility.

NOTE.—*Village of Palestine v. Oblong Gas Co.*, V I. P. U. C. 10; *Dexter Baker v. Cleveland, C. C. & St. L. R. Co.*, IV I. P. U. C. 97; *Re Public Service Co. of N. Illinois*, V I. P. U. C. 435, P. U. R. 1918-D 240.

50. Additions and New Structures—Joint Construction.

§ 50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes to be made or such structure or structures, be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost whereupon the said public

es shall have such reasonable time as the Commission may grant which to agree upon the portion or division of cost of such addi- extensions, repairs, improvements or changes or new structure or ures, which each shall bear. If at the expiration of such time such utilities shall fail to file with the Commission a statement that reement has been made for a division or apportionment of the cost pense of such additions, extensions, repairs, improvements or es, or new structure or structures, the Commission shall have rity, after further hearing, to make an order fixing the proportion ch cost or expense to be borne by each public utility and the man- which the same shall be paid or secured.

OTE.—See *Re Wabash Chester & Western R. Co. et al.*, III I. P. U. C. 49; *Re Service Co. of Northern Illinois* III I. P. U. C. 229; *Re Momence Utilities* I I. P. U. C. 257.

tate Public Utilities Comm. ex rel. Wabash R. Co. v. *Illin s Cent. R. Co.*, 274 reverses an order of the Commission requiring the construction of a new ocker and dividing the cost of operating it.

hicago, B. & Q. R. Co. v. *Cavanagh et al.*, 278 Ill. 609 holds that under sections d 58 the Commission has power where the public safety requires it, to com- e abolition of a grade crossing and the relocation of a railroad track; also he Commission may confer upon the railroad the power of eminent domain quire the necessary lands upon which to construct the new crossing.

Adequacy of Railroad Service—Hearing.

§ 51. Whenever the Commission, after a hearing had upon its own on or upon complaint, shall find that any railroad or street railroad pany does not run a sufficient number of trains or cars, or possess perate sufficient motive power, reasonably to accommodate the traffic, enger, or freight, transported by or offered for transportation to it, oes not run its trains or cars with sufficient frequency or at a reason- or proper time having regard to safety, or does not stop the same at per places, or does not run any train or trains, car or cars, upon a onable time schedule for the run, the Commission shall have power make an order directing any such railroad or street railroad company ncrease the number of its trains or of its cars or its motive power o change the time for starting its trains or cars or to change the time edule for the run of any train or car, or to change the stopping place places thereof, or to make any other order that the Commission may ermine to be reasonably necessary to accommodate and transport the ffic, passenger or freight, transported or offered for transportation.

Distribution of Cars—Expediting Traffic—Demurrage—Storage—Switching—Delivery of Express—Weights.

§ 52. Every railroad company shall, when within its power to do and upon reasonable notice, furnish suitable cars to any and all rsons who may apply therefor, for the transportation of any and all nds of freight in carload lots, and shall use reasonable diligence in ving freight and making deliveries thereof. In case of insufficiency cars at any time to meet all requirements, such cars as are available all be distributed among the several applicants therefor in proportion their respective immediate requirements without discrimination be- een shippers, localities or competitive or non-competitive places: *Pro- ded, however*, that preference may be given to shipments of live stock d perishable property. The Commission, after a hearing upon its own otion or upon complaint, may issue orders concerning the distribution cars.

The Commission shall have power to fix and establish reasonable rates, rules and regulations regarding demurrage, storage, icing and all other charges incident to the transportation of property, and to fix and establish reasonable switching rules and regulations, and to establish reasonable limits for said switching and reasonable rates therefor; and shall have power to provide proper rules and regulations the time within which all railroads shall furnish after demand therefor, all cars, equipment and facilities necessary for the handling of freight, in carload and less than carload lots, the time within which consignors and persons ordering cars shall load the same, and the time within which consignees and persons to whom freight may be consigned shall unload and discharge the same and receive freight from the freight rooms, and to provide penalties to be paid for failure on the part of the railroads, consignors and consignees to conform to such rules. The Commission shall also have the power to provide the time within which express packages shall be received, gathered, transported and delivered at destination, and the limits within which express packages shall be gathered and distributed and telegraph and telephone messages delivered without extra charge.

The Commission shall have power to enforce reasonable regulations for the weighing of cars, and of freight offered for shipment over any line of railroad, and to test the weights made by any railroad and scales used in weighing freight on cars.

NOTE.—Conference Rule No. 24; *Illiopolis Farmers' Grain Co.* v. *Wabash Ry. Co.*, IV I. P. U. C. 30; *State Public Utilities Comm.* v. *Atchison Topeka & St. Fe Ry. Co. et al.*, III I. P. U. C. 260; *Dexter Baber v. Cleveland, C. C. & St. Louis Ry. Co.*, IV I. P. U. C. 97; *State Public Utilities Comm.* v. *Alton & Southern R. Co.*, IV I. P. U. C. 87, IV I. P. U. C. 272.

State Public Utilities Comm. v. *Baltimore & O. S. W. R. Co.*, 281 Ill. 405 reversed an order of the Commission prescribing a plan to be followed by carriers in the distribution of coal cars in time of car shortage. The court held that this was a matter exclusively within the jurisdiction of the Interstate Commerce Commission.

53. Conditions in Contracts for Service Forms of Express Receipts.

§ 53. The Commission is authorized to make rules and regulations concerning the conditions to be contained in and become a part of contracts for public utility services, and any and all services concerning the same, or connected therewith.

The Commission shall have authority to prescribe a form of receipt for each shipment by express, also a form of receipt for moneys paid for charges for the transportation by express of any article or thing, to be given upon receipt, or upon the payment of such charges.

Upon demand of a shipper each receiving or forwarding express company shall be required to furnish a receipt or other evidence in writing, in such form as may be prescribed by or approved of by said Commission, stating the quantity, character, weight, order and condition of goods or articles tendered for shipment, and said express companies shall in like manner execute and furnish upon demand a receipt for the charges paid on any shipment, which shall cover substantially the following items: Date of shipment; name of consignor; name of connecting line or express company; name or description of each article or package covered by or in such receipt; the graduate scale or rate employed in making the rate or charge on such article or package, separately; the amount of charge on each article or package; the amount

lvanced charges (if any); the sum total of charges to be paid by the ignee. And any such express company is hereby prohibited from ading in any such receipt for shipments to be made any restriction or ion of the common law liability of such carrier.

Standards of Service.

§ 54. The Commission shall have power to ascertain, determine fix for each kind of public utility suitable and convenient standard mercial units of service, product or commodity, which units shall awful units for the purposes of this Act; to ascertain, determine and adequate and serviceable standards for the measurement of quantity, lity, pressure, initial voltage or other condition pertaining to the forming of its service or to the furnishing of its product or com- lity by any public utility, and to prescribe reasonable regulations for mining, measuring and testing such service, product or commodity, to establish reasonable rules, regulations, specifications and stand- s to secure the accuracy of all meters and appliances for examining, asuring, or testing such service, product or commodity. The Com- sion may purchase such materials, apparatus and standard measuring truments as it deems necessary to carry out the provisions of this tion.

The Commission shall provide for the inspection of the manner in ich every public utility conforms to the reasonable regulations pre- ibed by the Commission for examining, measuring and testing its vice, product or commodity, and the Commission may supplement such pections by examining, measuring and testing the service, product or mmodity of any public utility. Any consumer or user may have tested y appliance for examining, measuring or testing any such service, oduct or commodity upon payment of the fees fixed by the Commis- n. The Commission shall declare and establish reasonable fees to be id for examining and testing such appliances on the request of con- mers or users, the fee to be paid by the consumer or user at the time his request, but to be paid by the public utility and repaid to the nsumer or user if the measuring appliance be found unreasonably fective or incorrect to the disadvantage of the consumer or user.

The Commission, its officers, agents, experts or inspectors and ployees shall have power to enter upon any premises occupied by any blic utility for the purpose of making the examinations and tests ovided in this Act, and to set up and use on such premises any appara- s and appliances and occupy reasonable space therefor.

Nothing contained in this section shall limit in any manner any wers or authority vested in cities by Article VI of this Act, when such ties have acted pursuant to such authority.

NOTE.—See Conference Rule No. 19, II I. P. U. C. 16.

5. Certificate of Convenience and Necessity.

§ 55. No public utility shall begin the construction of any new lant, equipment, property or facility which is not in substitution of any xisting plant, equipment, property or faculties or in extension thereof r in addition thereto, unless and until it shall have obtained from the

Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto it shall have the power to issue certificates of public convenience and necessity.

Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of two years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.

NOTE.—*I-C Teleph. Co.* v. *Helmer* IV I. P. U. C. 125, P. U. R. 1917-D 197; *Chicago Teleph. Co.* v. *Postal Teleg.-Cable Co. of Illinois* IV I. P. U. C. 184, P. U. R. 1917-D 383; *Boone County Rural Teleph. Co.* v. *Farmers' Union Teleph. Co.*, IV I. P. U. C. 188, P. U. R. 1917-D 194; *Plymouth Mutual Teleph. Co.* v. *Plymouth Farmer's Switchboard Co.*, IV I. P. U. C. 191, P. U. R. 1917-E 464; *Re Schradermeyer* V I. P. U. C. 134.

See *State Public Utilities Comm. ex rel Chicago Teleph. Co.* v. *Postal Telegraph-Cable Co.*, 285 Ill. 411 holding that a telegraph company may install telephone service over its wires without an additional certificate of convenience and necessity.

State Public Utilities Comm. ex rel. Pike County Teleph. Co. v. *Noble et al*, 275 Ill. 121 holding that "the test whether the new construction is entirely new or is an extension of an existing plant is the determination as to whether or not it is a construction to further the same kind of business or to install a new service."

See also *State Public Utilities Comm. ex rel. Evansville Teleph. Co.* v. *Okaw Valley Mutual Teleph. Ass'n.*, 282 Ill. 336.

56. Report and Investigation of Accidents.

§ 56. Every public utility shall file with the Commission, under such rules and regulations as the Commission may prescribe, a report of every accident occurring, or that may occur, to or on its plant, equipment, or other property of such a nature as to endanger the safety, health or property of any person: *Provided*, that whenever any accident occasions the loss of life or limb to any person, such public utility shall immediately give notice to the Commission of the fact by the speediest means of communication, whether telephone, telegraph or post.

The Commission shall investigate all accidents occurring within this State upon the property of any public utility or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the Commission, investigation by it, and shall have the power to make such order or recommendation with respect thereto as in its judgment may seem just and reasonable: *Provided*, that neither the order or recommendation of the Commission nor any accident report filed with the Commission shall be admitted in evidence in any action for damages based on or arising out of the loss of life, or injury to person or property, in this section referred to.

NOTE.—See General Order No. 43, IV I. P. U. C. 71; General Order No. 44, IV I. P. U. C. 73; *State Public Utilities Comm.* v. *Chicago & M. Elec. R. Co.*, III I. P. U. C. 254; etc.

Safety of Plant, Appliances, Railroad Track, Etc.

§ 57. The Commission shall have power, after a hearing and upon own motion or upon complaint, by general or special orders, rules or ulations, or otherwise, to require every public utility to maintain and rate its plant, equipment or other property in such manner as to mote and safeguard the health and safety of its employees, passengers, tomers, and the public, and to this end to prescribe, among other ngs, the installation, use, maintenance and operation of appropriate ety or other devices or appliances, including interlocking and other tective devices at grade crossings or junctions and block or other tems of signalling, to establish uniform or other standards of equip- nt, and to require the performance of any other act which the health safety of its employees, passengers, customers or the public may mand.

Whenever it shall come to the knowledge of the Commission that equipment or appliances, or the apparatus, track, bridges, trestles or ier structures of any common carrier are out of repair or in an unsafe dition, it shall, after an investigation, give notice in writing to the mmon carrier of the improvements and changes deemed necessary to ce the same in a safe condition, and shall recommend to the common rrier that it make such repairs, changes, improvements or new con- uctions as the Commission shall deem necessary to the safety of per- ns and property being transported thereon. The Commission shall ve such common carrier an opportunity for a full hearing, and unless e common carrier shall satisfy the Commission that no action is quired to be taken with respect to any or all of such matters the Com- ission shall fix a time within which repairs, changes, improvements or w constructions deemed by it necessary shall be made. The Commis- on may also prescribe the rate of speed for trains or cars passing over fective tracks, bridges, trestles or other structures until repairs or new nstructions required are made; and may, if, in its opinion, it is need- l or proper, forbid the running of trains or cars over any defective ack, bridge, trestle or other structure until the same be repaired and aced in a safe condition.

NOTE—*Re Chicago & E. Illinois R. Co.*, IV I. P. U. C. 153; *Re Illinois Central ac. Co. et al.*, IV I. P. U. C. 110.

Grade Crossings—Construction—Reconstruction—Protection, Etc.

§ 58. No public road, highway or street shall hereafter be con- ructed across the track of any railroad company at grade, nor shall the ack of any railroad company be constructed across a public road, ighway or street at grade, nor shall the track of any railroad company e constructed across the track of any other railroad or street railroad ompany at grade, nor shall the track of a street railroad company be onstructed across the track of a railroad company at grade, without aving first secured the permission of the Commission: *Provided*, that his section shall not apply to the replacement of lawfully existing roads, ighways and tracks. The Commission shall have the right to refuse ts permission or to grant it upon such terms and conditions as it may rescribe. The Commission shall have power to determine and prescribe he manner, including the particular point of crossing, and the terms of

installation, operation, maintenance, use and protection of each such grade crossing.

The Commission shall also have power, after a hearing, to alter or abolish any grade crossing, heretofore or hereafter established, when in its opinion the public safety requires such alteration or abolition; or to require a separation of grades at such crossing; or to require a separation of grades at any proposed crossing where a proposed public highway may cross the tracks of any railroad or railroads; and to prescribe, after a hearing of the parties, the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad companies affected, or between such companies and the State, county, municipality or other public authority in interest: *Provided*, that nothing in this Act shall be construed to repeal an Act in relation to the crossing of one railroad by another, approved May 25, 1907, and in force July 1, 1907.

The Commission shall also have power by its order to require the construction, alteration, relocation or improvement of any crossing (including the necessary highway approaches thereto) of any railroad across any highway or public road, whether such crossing be at grade or by overhead structure or by subway, whenever the Commission finds after a hearing that such reconstruction, alteration, relocation or improvement is necessary to preserve or promote the safety of the public or of the employees or passengers of such railroad. By its original order or supplemental orders in such case, the Commission may direct such reconstruction, alteration, relocation or improvement to be made in such manner and upon such terms and conditions as may be reasonable and necessary, and may apportion the cost of such reconstruction, alteration, relocation or improvement between the railroad company or companies and other public utilities affected, or between such company or companies and other public utilities and the State, county, municipality, or other public authority in interest. The cost to be so apportioned shall include the cost of changes or alteration in the equipment of other public utilities affected as well as the cost of the relocation, diversion or establishment of any public highway, made necessary by such reconstruction, alteration, relocation or improvement of said crossing.

Whenever the Commission, after a hearing, shall find it necessary for the reconstruction, alteration, relocation or improvement of any such crossing or its necessary approaches as aforesaid, or for the abolishment of any such crossing, to relocate, divert or establish any highway or public road, or to acquire additional property for any such purpose, it may direct the railroad company or companies to acquire, and the railroad company or companies shall acquire, the necessary additional property for such purposes by purchase or, when the price to be paid can not be agreed upon with the owner thereof, in the manner provided by the law of eminent domain; or the Commission may certify such finding to the highway commissioners of the town or road district concerned. Every railroad company operating in the State of Illinois shall construct and maintain every highway grade crossing over its tracks within the State so that the roadway at the intersection shall be flush with the

ls, and, unless otherwise ordered by the Commission, shall construct d maintain the approaches thereto at a grade of not more than five) per cent within the right of way for a distance of not less than enty-five (25) feet on each side of such tracks; *provided* that the ades at the approaches may be maintained in excess of five (5) per t only when authorized by the Commission.

Every railroad operating within the State of Illinois shall remove m its rights of way at all grade crossings within the State, all brush, rubbery and trees for a distance of not less than five hundred feet 00) in either direction from each grade crossing.

On or before December 1, 1918, every railroad operating within e State of Illinois shall furnish, erect and thereafter maintain in a spicuous place at every grade crossing on its lines in this State outde of incorporated cities and villages, on both sides of the tracks cept when otherwise ordered and at such points as directed by the blic Utilities Commission, within the right of way of such railroad, grade crossings not designated as extra hazardous by the Commission ch standard signs as the Public Utilities Commission shall determine.

At all such grade crossings in the State as may be designated by e Commission as extra hazardous, but at no others, every railroad erating within the State of Illinois shall, within thirty days after the suance of an order by the Public Utilities Commission directing it so do, erect and thereafter maintain such standard stop signs as said mmission shall determine are necessary, provided that no such stop all be ordered or permitted by the Commission where there is a clear ew from the highway of approaching trains on such railroad trucks tracks) for at least five hundred feet (500) in each direction from the ossing at all points on the highway within a distance of two hundred 200) feet of such crossing. The Commission shall have power to quire such signs to be lighted at night or to be accompanied by red arning lights whenever in the opinion of the Commission such addiional precautions are reasonably necessary for the public safety.

Any person who unlawfully removes, throws down, injures or deaces any sign required in this section, shall be liable to a fine of not less an ten dollars ($10.00) nor more than one hundred dollars ($100.00) r each offense. (As amended June 29, 1917.)

NOTE.—General Order No. 55, VI I. P. U. C. 293; *Re Wabash Chester & Western R. Co. et al.*, III I. P. U. C. 49; *Illinois Cent. R. Co.* v. *City of Decatur* II I. P. U. C. 241, P. U. R. 1916-A 987; *State Public Utilities Comm.* v. *Illinois Central R. Co.*, IV I. P. U. C. 249; *Re Missouri Pacific R. Corp.*, V I. P. U. C. 456. *Chicago, Burlington & Quincy R. Co.* v. *Cavanagh et al.*, 278 Ill. 609 holds that under section 50 and 58 the Commission has power, where the public safety requires it, to compel the abolition of a grade crossing and the relocation of a railroad track; also that the Commission may confer upon the railroad the power of eminent domain to acquire the necessary lands upon which to construct the new crossing.

59. Eminent Domain.

§ 59. When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under sections 50 or 58 or subdivision two (2) of section 81 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

NOTE.—*Re Public Service Co. of Northern Illinois* III I. P. U. C. 229; *Edwardsville Water Co.* v. *Madison County L. & P. Co.*, VI I. P. U. C. 113.

ARTICLE V.

PROCEEDINGS BEFORE THE COMMISSION AND IN THE COURTS.

60. Investigations and Hearings.

§ 60. The Commission, or any commissioner, or officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts relating to public utilities, subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner or an officer of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

Each commissioner, the secretary of the Commission, and every officer of the Commission designated by it to hold any inquiry, investigation or hearing, shall have power to administer oaths and affirmations, certify to all official acts, issue subpœnas, compel the attendance and testimony of witnesses, and the production of papers, books, accounts and documents.

The words "public hearing" mean the right to appear, give evidence and to hear and examine witnesses whose testimony is presented. *Farmers' Elevator Co. of Yorkville* v. *Chicago, R. I. & Pacific Ry.* 266 Ill. 567.

61. Testimony—Immunity of Witnesses.

§ 61. No person shall be excused from testifying or from producing any papers, books, accounts or documents in any investigation or inquiry or upon any hearing ordered by the Commission, when ordered to do so by the Commission or any commissioner, or officer of the Commission, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Commission or a commissioner or an officer of the Commission: *Provided*, that such immunity shall extend only to a natural person, who in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

62. Attendance of Witnesses—Production of Papers.

§ 62. All subpœnas issued under the terms of this Act may be served by any person of full age. The fees of witnesses for attendance and travel shall be the same as fees of witnesses before the Circuit Courts of this State, such fees to be paid when the witness is excused from further attendance, when the witness is subpœnad at the instance of the Commission or any commissioner; and the disbursements made in the payment of such fees shall be audited and paid in the same manner

s are other expenses of the Commission. Whenever a subpœna is issued t the instance of a complainant, respondent, or other party to any proceding before the Commission, the Commission may require that the ost of service thereof and the fee of the witness shall be borne by the arty at whose instance the witness is summoned, and the Commission hall have power, in its discretion, to require a deposit to cover the cost f such service and witness fees and the payment of the legal witness ee and mileage to the witness when served with subpœna. A subpœna ssued as aforesaid shall be served in the same manner as a subpœna ssued out of a court of record.

Any person who shall be served with a subpœna to appear and estify, or to produce books, papers, accounts or documents, issued by the Commission or by any commissioner or officer of the Commission, in he course of an inquiry, investigation or hearing conducted under any f the provisions of this Act, and who shall refuse or neglect to appear, r to testify, or to produce books, papers, accounts and documents relevant to said inquiry, investigation or hearing as commanded in such subpœna, shall be guilty of a misdemeanor.

Any Circuit Court of this State, or any judge thereof, either in term time or vacation, upon application of the Commission, or a commissioner or officer of the Commission, may, in his discretion, compel the attendance of witnesses, the production of books, papers, accounts and documents, and the giving of testimony before the Commission, or before any such commissioner or officer, by an attachment for contempt or otherwise, in the same manner as production of evidence may be compelled before said court.

The Commission or a commissioner or any officer of the Commission or any party may in any investigation or hearing before the Commission, cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the courts of this State and to that end may compel the attendance of witnesses and the production of papers, books, accounts, and documents.

The Commission may require, by order served on any public utility in the manner provided herein for the service of orders, the production within this State at such time and place as it may designate, of any books, accounts, papers or documents kept by any public utility operating within this State in any office or place without this State, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the Commission or under its direction.

63. Right to Inspect Books and Property and Examine Agents of Public Utilities.

§ 63 The Commission, each commissioner and each officer and person employed by the Commission shall have the right, at any and all times, to inspect the papers, books, accounts and documents, plant, equipment or other property of any public utility, and the Commission, each commissioner and any officer of the Commission authorized to administer oaths shall have power to examine under oath any officer, agent or employee of such public utility in relation to any matter within the jurisdiction of the Commission: *Provided*, that any person other

than a commissioner demanding such inspection shall produce under the seal of the Commission his authority to make such inspection: *And, provided, further,* that a written record of the testimony or statement so given under oath shall be made and filed with the Commission. Information so obtained shall not be admitted in evidence or used in any proceeding except in proceedings provided for in this Act.

64. Complaints—Notice.

§ 64. Complaint may be made by the Commssion, of its own motion or by any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing, setting forth any act or thing done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review by the courts of orders of the Commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint the Commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice requiring that the complaint be satisfied and answered within a reasonable time to be specified by the Commission, or within the discretion of the Commission, by a notice fixing a time when and place where a hearing will be had upon such complaint. Notice of the time and place shall also be given to the complainant and to such other persons as the Commission shall deem necessary. The Commission shall have authority to hear and investigate any complaint, not withstanding the fact that the person or corporation complained of may have satisfied the complaint.

The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint except as herein provided. Service in all hearings, investigations, and proceedings before the Commission may be made upon any person upon whom a summons may be served in accordance with the provisions of an Act entitled, "An Act in relation to practice and procedure in courts of record," approved June 3, 1907, in force July 1, 1907, and may be made personally or by mailing same in the United States mail in a sealed envelope, registered, with postage prepaid. The provisions of this section as to notice shall apply to all hearings held by the Commission or under its authority.

Any public utility shall have a right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint may be heard *ex parte* by the Commission or may be served upon any parties designated by the Commission.

NOTE.—*Re Western Illinois Teleph. Co. et al.*, V I. P. U. C. 1.

Hearings—Orders—Records—Copies of Official Documents and Orders.

§ 65. At the time fixed for any hearing upon a complaint, the mplainant and the person or corporation complained of, and such rsons or corporations as the Commission may allow to intervene, shall entitled to be heard and to introduce evidence. The Commission shall ue process to enforce the attendance of all necessary witnesses. At the nclusion of such hearing the Commission shall make and render findgs concerning the subject-matter and facts inquired into and enter order based thereon. A copy of such order, certified under the seal the Commission, shall be served upon the person or corporation comained of, or his or its attorney, which order shall, of its own force, take fect and become operative twenty days after the service thereof, except otherwise provided, and shall continue in force either for a period hich may be designated therein or until changed or abrogated by the ommission. Where an order cannot, in the judgment of the Commisn, be complied with within twenty days, the Commission may prescribe ch additional time as in its judgment is reasonably necessary to comy with the order, and may, on application and for good cause shown, tend the time for compliance fixed in its order. A full and complete cord shall be preserved of all proceedings had before the Commission, any member thereof, on any formal hearing had, and all testimony all be taken down by a stenographer appointed by the Commission, and e parties shall be entitled to be heard in person or by attorney.

In case of an appeal from any order or decision of the Commission, nder the terms of sections 68 and 69 of this Act, a transcript of such stimony, together with all exhibits or copies thereof introduced and ll information secured by the Commission on its own initiative and nsidered by it in rendering its order or decision, and of the pleadings, cords and proceedings in the case, shall constitute the record of the ommission: *Provided*, that on appeal from an order or decision of the ommission, the person or corporation taking the appeal and the Comission may stipulate that a certain question or certain questions alone nd a specified portion only of the evidence shall be certified to the court r its judgment, whereupon such stipulation and the question or quesons and the evidence therein specified shall constitute the record on ppeal.

Copies of all official documents and orders filed or deposited accordng to law in the office of the Commission, certified by a commissioner r by the secretary of the Commission to be true copies of the originals, nder the official seal of the Commission, shall be evidence in like manner as the originals.

In any matter concerning which the Commission is authorized to old a hearing, upon complaint or application or upon its own motion, otice shall be given to the public utility and to such other interested ersons as the Commission shall deem necessary in the manner provided n the preceding section, and the hearing shall be conducted in like manner as if complaint had been made to or by the Commission. But nothing in this Act shall be taken to limit or restrict the power of the Commission, summarily, of its own motion, with or without notice, to conduct any investigations or inquiries authorized by this Act, in such

manner and by such means as it may deem proper, and to take such action as it may deem necessary in connection therewith. With respect to any rules, regulations, decisions or orders, which the Commission is authorized to issue without a hearing, and so issues, any public utility or other person or corporation affected thereby and deeming such rules, regulations, decisions or orders, or any of them, improper, unreasonable or contrary to law, may apply for a hearing thereon, setting forth specifically in such application every ground of objection which the applicant desires to urge against such rule, regulation, decision or order. The Commission may, in its discretion, grant or deny the application, and a hearing, if had, shall be subject to the provisions of this and the preceding sections.

NOTE.—*Re Western Illinois Teleph. Co.* et al., V I. P. U. C. 1. See also *State Public Utilities Comm. ex rel. Alton Bd. of Trade* v. *Cleveland, C. C. & St. Louis Ry. Co.*, 285 Ill. 184.

Where the only effect of an order of the Railroad and Warehouse Commission was to continue in effect a certain switching tariff until such tariff should be changed by agreement or on a hearing, and no new rate is established or attempted to be established the order need not, to be valid, contain a finding that the railroads interested had refused or neglected to voluntarily establish a new rate or that such new rate is necessary. *Chicago, M. & St. Paul Ry. Co.* v. *State Public Utilities Comm.* 267 Ill. 544.

66. Service of Orders.

§ 66. Every order of the Commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing in the United States mail a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or in the case of a corporation, to any officer or agent thereof upon whom a summons of a court of record may be served in an action at law. It shall be the duty of every person and corporation to notify the Commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the Commission every person and corporation upon whom it is served must, if so required in the order, notify the Commission in like manner whether the terms of the order are accepted and will be obeyed.

67. Modification of Order or Decision—Rehearing.

§ 67. The Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. Any order rescinding, altering or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original rules, regulations, orders or decisions.

After any rule, regulation, order or decision has been made by the Commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a hearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the Commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear.

pplication for rehearing shall not excuse any corporation or person complying with and obeying any rule, regulation, order or decision ny requirement of any rule, regulation, order or decision of the mission theretofore made, or operate in any manner to stay or post- the enforcement thereof, except in such cases and upon such terms e Commission may by order direct. If, after such rehearing and deration of all the facts, including those arising since the making e rule, regulation, order or decision, the Commission shall be of the ion that the original rule, regulation, order or decision or any part of is in any respect unjust or unwarranted, or should be changed, Commission may rescind, alter or amend the same. A rule, regula- order or decision made after such rehearing, rescinding, altering mending the original rule, regulation, order or decision shall have same force and effect as an original rule, regulation, order or de- n, but shall not affect any right or the enforcement of any right ng from or by virtue of the original rule, regulation, order or ion unless so ordered by the Commission. Only one rehearing shall ranted by the Commission; but this shall not be construed to pre- any party from filing a petition setting up a new and different state acts after two years, and invoking the action of the Commission con.

NOTE.—See *Illinois Cent. R. Co. et al.* v. *Bloomington etc. R. Co.*, IV I. P. U. 5; *Re Chicago North Shore & M. R. Co.*, VI I. P. U. C. 374. See also *State Public Utilities Comm. ex rel. Wabash R. Co.* v. *Illinois Cent. o.* 274 Ill. 36; *Farmers' Elevator Co. of Yorksville et al.* v. *Chicago, Rock d & Pacific Ry. Co.* 266 Ill. 567.

Action to Set Aside Orders of Commission.

§ 68. Within thirty days after the service of any order or decision ne Commission made after a final hearing or within thirty days after earing or refusal of a hearing upon any rule, regulation, order or sion which the Commission is authorized to issue without a hearing has so issued, any person or corporation affected by such rule, regu- on, order or decision may appeal to the Circuit Court of Sangamon nty, for the purpose of having the reasonableness or lawfulness of rule, regulation, order or decision inquired into and determined: *vided*, that no proceeding to contest any rule, regulation, decision or er which the Commission is authorized to issue without a hearing and so issued, shall be brought in any court unless application shall have n first made to the Commission for a hearing thereon and until after n application has been acted upon by the Commission, nor shall any son or corporation in any court urge or rely upon any grounds not set h in such application for a hearing before the Commission: *And, vided*, the Commission shall decide the questions presented by said lication with all possible expedition consistent with the duties of the mmission. The party taking such an appeal shall file with the secre- y of the Commission, at its office in Springfield, Illinois, written ice of said appeal. The Commission, upon the filing of such notice appeal, shall, within five days thereafter, file with the clerk of said cuit Court of Sangamon County a certified copy of the order appealed m and within ten days thereafter the record provided for in section

64. The party serving such notice of appeal shall, within five days after the service of such notice upon the Commission, file a copy of said notice, with proof of service, with the clerk of said court to which such appeal is taken, and thereupon said Circuit Court shall have jurisdiction over said appeal and the same shall be entered upon the records of said Circuit Court and shall be tried therein without formal pleadings, but otherwise according to the rules relating to the trial of chancery suits, so far as the same are applicable.

No new or additional evidence may be introduced in any proceeding upon appeal from a rule, regulation, order or decision of the Commission, issued or confirmed after a hearing, but the appeal shall be heard on the record of the Commission as certified to by it. The findings and conclusions of the Commission on questions of fact shall be held *prima facie* to be true and as found by the Commission; and a rule, regulation, order or decision of the Commission shall not be set aside unless it clearly appears that the finding of the Commission was against the manifest weight of the evidence presented to or before the Commission for and against such rule, regulation, order or decision, or that the same was without the jurisdiction of the Commission. If it appears that the Commission failed to receive evidence properly proffered, on a hearing or on a rehearing, or on application therefor, the court shall remand the case to the Commission with instructions to receive the testimony so proffered and rejected, and to enter a new order based upon the evidence theretofore taken, and such new evidence as it is directed to receive. Rules, regulations, orders or decisions of the Commission shall be held to be *prima facie* reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions. Upon hearing any such appeal the court shall enter judgment either affirming or setting aside the rule, regulation, order or decision of the Commission.

When no appeal is taken from a rule, regulation, order or decision of the Commission, as herein provided, parties affected by such rule, regulation, order or decision, shall be deemed to have waived the right to have the merits of said controversy reviewed by a court and there shall be no trial of the merits of any controversy in which such rule, regulation, order or decision was made, by any court to which application may be made for a writ to enforce the same, in any other judicial proceeding.

NOTE.—See, *State Public Utilities Comm.* v. *Atchison, Topeka & St. Fe Ry. Co.*, 279 Ill. 194; *State Public Utilities Comm. ex rel. E. St. Louis Stone Co.* v. *Terminal R. Ass'n. of St. Louis et al.*, 281 Ill. 181; *State Public Utilities Comm. ex rel. Farmers' Illinois Grain Delivers Ass'n. et al.* v. *Atchison, Topeka & St. Fe Ry Co. et al.*, 278 Ill. 58; *State Public Utilities Comm. ex rel. Chicago Bd. of Trade* v. *Toledo, St. Louis & W. R. Co.*, 286 Ill. 582; *Kennedy* v. *State Public Utilities Comm.* 286 Ill. 490.

Railroad & Warehouse Comm. v. *Louisville & Nashville Ry. Co.*, 267 Ill. 37, holds that a proceeding in the Circuit Court to determine the reasonableness of an order entered by the Commission is not an appeal, because there can be no appeal from an order of an administrative body. The court, in such case acts on evidence submitted before it, though the Commissions finding makes a *prima facia* case.

"The statute makes the Commission's findings of fact *prima facie* true, and its orders and decisions are not to be set aside unless clearly against the manifest weight of the evidence. It is not sufficient, to justify a reversal of a reasonable order of the Commission made in the lawful exercise of its powers, that a court of review should be of the opinion the order was unwise or inexpedient. To reverse and set aside an order on the ground that it is unreasonable it must be an arbitrary action, not resting on a reasonable basis for the exercise of the discretionary powers of the Commission. The orders and decisions are subject to review as to the reasonableness of the Commission's conclusions, and an unreasonable order is unlawful. Reviewing courts will examine the facts upon which

rder is based, and if there is substantial evidence to sustain the order—not a scintilla of proof—the order will be sustained." *Chicago Bus Co.* v. *Chicago Co.* 287 Ill. 320, 329 citing *Inter-State Commerce Comm.* v. *Union Pac. R.* 22 U. S. 54; *State Public Utilities Comm.* v. *Chicago & West Towns Ry. Co.*, l. 555; *State Public Utilities Comm.* v. *Terminal R. Ass'n.* 281 Ill. 181; and *Public Utilities Comm.* v. *Toledo, St. Louis & W. R. Co.*, 267 Ill. 93. See also *Public Utilities Comm.* v. *Chicago M. & St. P. Ry. Co.*, 287 Ill. 412, 417. The court on review will not consider the propriety of the decision but only onstitutionality, i. e. whether the Commission acted within the scope of its rity. *Chicago, M. & St. P. Ry. Co.* v. *State Public Utilities Comm.* 267 Ill. *Chicago M. & St. P. Ry. Co.* v. *State Public Utilities Comm.* 268 Ill. 49.

Appeals to Supreme Court from Circuit Court Judgments.

§ 69. Appeals from all final orders and judgments entered by aid Circuit Court, in review of rules, regulations, orders or decisions e Commission, may be taken directly to the Supreme Court by either y to the action, within sixty days after service of a copy of the order dgment of said Circuit Court, and shall be governed by the rules ying to chancery cases appealed to said Supreme Court, except that al pleadings shall not be required.

NOTE.—See *Chicago, M. & St. P. Ry. Co.* v. *State Public Utilities Comm.*, 267 44; *State Public Utilities Comm. ex rel. E. St. Louis Stone Co.* v. *Terminal R. . of St. Louis*, 281 Ill. 181.

Expedition of Cases.

§ 70. Any proceeding in any court in this State directly affecting le, regulation, order or decision of the Commission, or to which the mission is a party, shall have priority in hearing and determination all other civil proceedings pending in such court, excepting election ests.

Suspension of Order of Commission Pending Judicial Review.

§ 71. The pendency of an appeal shall not of itself stay or suspend operation of the rule, regulation order or decision of the Commis-, but during the pendency of such appeal the Circuit Court of gamon County, or the Supreme Court, as the case may be, in its retion may stay or suspend, in whole or in part, the operation of the mission's rule, regulation, order or decision.

No order so staying or suspending a rule, regulation, order or deci- of the Commission shall be made by the court otherwise than upon e days' notice to the Commission and after a hearing, and if the , regulation, order or decision of the Commission is suspended, the er suspending the same shall contain a specific finding based upon dence submitted to the court, and identified by reference thereto, t great or irreparable damage would otherwise result to the petitioner, specifying the nature of the damage:

Provided, however, that when any rate or other charge has been in e for any length of time exceeding one year, and such rate or other rge is advanced by the public utility, and the order of the Commis- reinstates such prior rate or other charge, in whole or in part, no pending order shall be allowed in any case from such order pending final determination of the case in the Circuit Court, or if appealed the Supreme Court by such Supreme Court.

In case the rule, regulation, order or decision of the Commission is ved or suspended, the order of the court shall not become effective il a suspending bond shall first have been executed and filed with, d approved by the Commission (or approved, on review, by the court)

payable to the people of the State of Illinois, and sufficient in amount and security to insure the prompt payment, by the party petitioning for the review, of all damages caused by the delay in the enforcement of the rule, regulation, order or decision of the Commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the rule, regulation, order or decision of the Commission, in case said rule, regulation, order or decision is sustained. The court, in case it stays or suspends the rule, regulation, order or decision of the Commission in any matter affecting rates or other charges or classifications, may, in its discretion, also by order direct the public utility affected to pay into court, from time to time, thereto to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the rule, regulation, order or decision of the Commission had not been stayed or suspended.

72. Reparation for Overcharge—Investigation of Claims Against Utilities.

§ 72. When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the order of the Commission shall be *prima facie* evidence of the facts therein stated. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and colected as a part of the costs of the action.

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the product, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order.

The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

The Commission shall have power to receive complaints regarding loss or damage occasioned by a public utility, and to make inquiry as to

methods of adjusting such claims. All claims against any public lity for loss of, or damage to, property, or for any other loss or nage, in connection with a public utility service, not covered by the ceding paragraphs of this section, if not acted upon within ninety ys from the date of the filing of the claim with the public utility, may investigated by the Commission, in its discretion, and the results of h investigation shall be embodied in a special report which shall be en to public inspection.

NOTE.—*State Public Utilities Comm. ex rel. Harley B. Mitchell et al. v. Chi-go & West Towns Ry. Co.*, 275 Ill. 555.

Civil Damages.

§ 73. In case any public utility shall do, cause to be done or per-t to be done any act, matter or thing prohibited, forbidden or declared be unlawful, or shall omit to do any act, matter or thing required to done either by any provisions of this Act or any rule, regulation, der or decision of the Commission, issued under authority of this Act, ch public utility shall be liable to the persons or corporations affected ereby for all loss, damages or injury caused thereby or resulting there-om, and if the court shall find that the act or omission was wilful, the urt may in addition to the actual damages, award damages for the ke of example and by the way of punishment. An action to recover r such loss, damage or injury may be brought in any court of compe-nt jurisdiction by any person or corporation.

In every case of a recovery of damages by any person or corporation nder the provision of this section, the plaintiff shall be entitled to a easonable counsel's or attorney's fee to be fixed by the court, which fee hall be taxed and collected as part of the costs in the case.

No recovery as in this section provided shall in any manner affect a ecovery by the State of the penalties in this Act provided.

4. Remedies Cumulative.

§ 74. This Act shall not have the effect to release or waive any ight of action by the State, the Commission, or by any body politic, unicipal corporation, person or corporation for any right or penalty hich may have arisen or accrued or may hereafter arise or accrue under ny law of this State.

All penalties accruing under this Act shall be cumulative of each ther, and suit for the recovery of one penalty shall not be a bar to or ffect the recovery of any penalty or be a bar to any criminal prose-ution against any public utility, or any officer, director, agent or em-loyee thereof, or any other corporation or person.

75. Mandamus or Injunction Proceedings at Instance of Commission.

§ 75. Whenever the Commission shall be of the opinion that any public utility is failing or omitting or about to fail to omit, to do any-thing required of it by law, or by any order, decision, rule, regulation, direction or requirement of the Commission, issued or made under authority of this Act, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or any order, decision, rule, regulation, direction or requirement of the Commission, issued or made under authority of

this Act, it shall direct the counsel for the Commission to commence an action or proceeding in the Circuit Court, or in any other court of concurrent jurisdiction, in and for the county in which the case or some part thereof arose, or in which the person or corporations complained of, if any, has its principal place of business, or in which the person complained of, if any, resides, in the name of the people of the State of Illinois, for the purpose of having such violation or threatened violations stopped and prevented, either by mandamus or injunction. Counsel for the Commission shall thereupon begin such action or proceeding by petition to such Circuit Court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding twenty days after the service of the copy of the petition, within which the public utility complained of must answer the petition, and in the meantime said public utility may be restrained. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances of the case. Such corporations or persons as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. An appeal may be taken from such final judgment in the same manner and with the same effect, subject to the provisions of this Act, as appeals are taken from judgments of the Circuit Court in other actions for mandamus or injunction.

76. Penalty for Violation of Act or Orders by Public Utility or Other Corporation—Separate Offenses.

§ 76. Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this Act, or which fails to obey, observe or comply with any order, decision, rule, regulation, direction or requirement or any part or provision thereof, of the Commission, made or issued under authority of this Act, in a case in which a penalty is not otherwise provided for in this Act, upon conviction, shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars for each and every offense.

Every violation of the provisions of this Act or of any order, decision, rule, regulation, direction or requirement of the Commission, or any part or portion thereof by any corporation or person is a separate and distinct offense and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

In construing and enforcing the provisions of this Act relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be and be deemed to be the act, omission, or failure of such public utility.

77. Persons Violating Act or Order—Penalty.

§ 77. Every person, who, either individually, or acting as an officer, agent or employee of a public utility or of a corporation other than a public utility, violates or fails to comply with any provisions of this Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the Commission, made or issued under authority of this Act, or who procures, aids or abets any public utility in its violation of this Act or in its failure to obey, observe or comply with this Act or any such order, decision, rule, regulation, direction or requirement, or any part or portion thereof, in a case in which a penalty is not otherwise provided for in this Act, is guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

78. Actions to Recover Penalties.

§ 78. Except as otherwise provided in this Act, actions to recover penalties under this Act shall be brought in the name of the People of the State of Illinois in the Circuit Court in and for the county in which the cause or some part thereof arose, or in which the corporation complained of, if any, has its principal place of business, or in which the person, if any, complained of, resides. Such action shall be commenced and prosecuted to final judgment by the counsel for the Commission. In any such action, all penalties incurred up to the time of commencing the same may be sued for and recovered. In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the State in any such action shall be paid into the State treasury to the credit of the general fund. Any such action may be compromised or discontinued on application of the Commission upon such terms as the court shall approve and order.

79. Duty of Commission to Prosecute and to Enforce Laws Affecting Public Utilities.

§ 79. It is hereby made the duty of the Commission to see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State, therefor recovered and collected, and to this end it may sue in the name of the people of the State.

See *State Public Utilities Comm. ex rel. Ed. Beck* v. *Toledo, St. Louis & W. R. Co* 267 Ill. 93 holding that the Commission has power under this section to order the erection and maintenance of depots as required in ch. 114 Hurds. Rev. Stat. 1913.

80. Cancellation of Warehouses Licenses.

§ 80. The Commission is hereby authorized to hear and determine all applications for the cancellation of warehouse licenses in this State which may be issued in pursuance of any laws of this State, and for that purpose to make and adopt such rules and regulations concerning such hearing and determination as may, from time to time, by it be deemed proper. And if, upon such hearing, it shall appear that any public ware-

houseman has been guilty of violating any law of this State concerning the business of public warehousemen, the Commission may cancel and revoke the license of said public warehouseman, and immediately notify the officer who issued such license of such revocation and cancellation; and no person whose license as a public warehouseman shall be cancelled or revoked shall be entitled to another license or to carry on the business in this State of such public warehouseman until the expiration of six months from the date of such revocation and cancellation, and until he shall have again been licensed: *Provided*, that this section shall not be construed so as to prevent any such warehouseman from delivering any grain on hand at the time of such revocation or cancellation of his said license. And all licenses issued in violation of the provisions of this section shall be deemed null and void.

ARTICLE VI.

REPEAL—SAVING CLAUSE—CONSTRUCTION.

81. Acts Repealed—Transfer and Continuation of Power of R. R. Commission.

§ 81. An Act entitled, "An Act to establish a board of railroad and warehouse commissioners, and prescribe their powers and duties," approved April 13, 1871, in force July 1, 1871, together with the amendments thereto; and an Act entitled, "An Act defining and regulating express companies and carriers by express operating within the State of Illinois, declaring them to be common carriers and placing them under the jurisdiction and control of the Illinois Railroad and Warehouse Commission," approved June 9, 1911, in force July 1, 1911, are hereby repealed from and after the appointment of the State Public Utilities Commission herein created. Nothing in this Act shall be construed to repeal any other Act or part thereof conferring power on said Board of Railroad and Warehouse Commissioners except such as are in direct conflict herewith, but the rights, powers and duties conferred by law upon the Board of Railroad and Warehouse Commissioners shall be continued in full force and transferred to the State Public Utilities Commission, it being the intent of this Act to substitute the State Public Utilities Commission for the said Board of Railroad and Warehouse Commissioners.

On or before November 1, 1913, the Board of Railroad and Warehouse Commissioners shall transfer and deliver to the State Public Utilities Commission, upon its demand in writing, all books, papers and records; furniture, equipment and supplies of whatever description in its possession; and the Public Utilities Commission shall take possession of all such books, papers and records, furniture, equipment and supplies.

82. Actions and Proceedings Pending Before R. R. Commission.

§ 82. This Act shall not affect pending actions or proceedings, civil or criminal, in any court, brought by or against the people of the State of Illinois or the Board of Railroad and Warehouse Commissioners or by any other person, firm or corporation under the provisions of the Acts establishing or conferring power on the Board of Railroad and Warehouse Commissioners, nor abate any causes of action arising thereunder, but the same may be instituted, prosecuted and defended with the

same effect as though this Act had not been passed. Any investigation, hearing or proceeding, instituted or conducted by the Board of Railroad and Warehouse Commissioners prior to the taking effect of this Act may be conducted and continued to a final determination by the Public Utilities Commission with the same effect as if this Act had not been passed.

All findings, orders, decisions, rules and regulations issued or promulgated by the Board of Railroad and Warehouse Commissioners under the Acts established or conferring power on said board, shall continue in force and have the same effect as though this Act had not been passed; and the State Public Utilities Commission hereby created is empowered to enforce said findings, orders, decisions, rules and regulations in the same manner and under the same conditions as though said findings, orders, decisions, rules and regulations had been made, issued or promulgated by the State Public Utilities Commission.

NOTE.—See *Illinois Central R. Co. et al.* v. *Bloomington etc. R. Co.*, IV I. P. U. C. 105; *State Public Utilities Comm. ex rel Atwood-Davis Sand Co.* v. *Chicago, & Northwestern Ry. Co.* 286 Ill. 53; *State Public Utilities Comm. ex rel. Farmer's Illinois Grain Dealers Ass'n. et al.* v. *Atchison, T. & St. Fe Ry. Co.*, 278 Ill. 58.

83. Constitutionality—Divisability of Act.

§ 83. If any section, subdivision, sentence or clause of this Act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portion of this Act.

84. Act Not Applicable to Interstate Commerce.

§ 84. Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this Union, except when specifically so stated, and in so far as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States.

85. Technical Omissions Not to Invalidate Acts of Commission.

§ 85. A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the acts, orders, decisions, rules and regulations of the Commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

86. Effective Date of Act.

§ 86. This Act shall take effect and be in force on and after the first day of January, 1914.

APPROVED June 30, 1913.

MUNICIPAL OWNERSHIP ACT.

§ 1. Power conferred.
§ 2. Term "public utility" defined.
§ 3. Ordinance to acquire or operate public utility—referendum.
§ 4. Proposition to operate public utilities — referendum — proceedings heretofore legalized.
§ 5. Ordinance to lease public utility.
§ 6. Reservation of rights in lease or grant.
§ 7. Acquisition by agreement or condemnation.
§ 8. Bond issues.
§ 9. Public utility certificates.
§ 10. Expenses of acquiring property, etc.—special assessments authorized.
§ 11. Reclamation of submerged land under public waters—exception.
§ 12. Charges for service.
§ 13. Separate accounts—report—examination.
§ 14. Construction of Act.
§ 15. Term "city" defined.

(Senate Bill No. 538. Approved June 26, 1913.)

AN ACT *entitled, "An Act to authorize cities to acquire, construct, own, and to lease or operate public utilities and to provide the means therefor."*

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any city in this State shall have the power, subject to the provisions of this Act, to acquire, construct, own and operate any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants, and to contract for, purchase, and sell to private persons or corporations the products or service of such utilities; to lease any public utility owned by the city to any corporation organized under the laws of this State for the purpose of operating such public utility, for a period not longer than twenty years; to fix the rates and charges for the services rendered by such public utilities; and to make all needful rules and regulations in relation thereto.

§ 2. The term "public utility," when used in this Act, means and includes any plant, equipment or property, and any franchise, license or permit, used or to be used for or in connection with the transportation of persons or property or the conveyance of telegraph or telephone messages; or for the production, storage, transmission, sale, delivery, or furnishing of cold, heat, light, power, or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger.

§ 3. No city shall proceed to acquire or construct any public utility under the provisions of this Act until an ordinance of the city council providing therefor has been duly passed and submitted to the electors of such city and approved by a majority of those voting thereon. Such ordinance shall set forth the action proposed, shall describe the plant, equipment and property proposed to be acquired or constructed, and shall provide for the issue of bonds, mortgage certificates or special assessment bonds, as hereinafter authorized.

§ 4. No city shall itself proceed to operate any such public utility for the use or benefit of private consumers or users, for hire or charge for such compensation [consumption] or use, unless the proposition to operate shall first have been submitted to the electors of the city as a separate proposition and approved by a majority of those voting thereon; but any city may, without such submission and approval, sell electricity for heat, light or power within or without the limits of the city, generated from any electric lighting plant owned and operated by the city for the city's own use, and may without such submission and approval sell water within and without the city from any water plant owned and operated by the city: *Provided*, that the act of any city or village which has heretofore constructed, maintained, operated, controlled or leased any public utility and furnished and sold the product or service thereof for private use is hereby declared to be legal and valid, anything in any law of the State to the contrary notwithstanding.

§ 5. No ordinance authorizing the lease of any public utility owned by a city for a longer period than five years, nor any ordinance renewing any such lease shall go into effect until the expiration of sixty days from and after its passage. If, within such sixty days, there is filed with the city clerk of such city a petition signed by qualified electors of the city equal to five per cent of the votes cast at the last preceding municipal election for mayor in such city, asking that such ordinance be submitted to popular vote, then such ordinance shall not go into effect unless the question of the adoption of such ordinance shall first be submitted to the electors of such city and approved by a majority of those voting thereon.

§ 6. It shall be lawful for any city to incorporate in any franchise, license or permit to a public utility company reservation of the right on the part of the city to take over all or any part of the property, plant, or equipment used in the operation of such public utility, at or before the expiration of such grant, upon such terms and conditions as may be provided in the grant, and it shall also be lawful to provide in any such grant that in case such reserved right be not exercised by the city, and it shall grant the right to another person or corporation to operate such utility in the streets and parts of streets occupied by its grantee under the former grant, the new grantee shall purchase and take over the property located in such streets, and parts of streets upon the terms which the city might have taken it over.

§ 7. Any city shall have the power to acquire any public utility or any part thereof, authorizing or operating in such city under a license, permit or franchise or operating in such city without any license, permit or franchise, by an agreement with such public utility or may proceed to procure the condemnation of the same in the manner provided by law for the taking and condemning of private property for public use.

§ 8. For the purpose of acquiring any such public utility or the property necessary or appropriate for the operation thereof or any part thereof, either by purchase, condemnation or construction, any city may borrow money and issue negotiable bonds therefor, pledging the faith and credit

the city, but no such bonds shall be issued unless the proposition to e the same shall first have been submitted to the electors of such city approved by a majority of those voting thereon, nor in an amount in ess of the cost to the city of the property for which said bonds are ed and ten per cent of such cost in addition thereto.

9. For the purpose of acquiring any such public utility or the prop- necessary or appropriate for the operation thereof, or any part thereof, ier by purchase, condemnation or construction, any city may issue and pose of interest bearing certificates, hereinafter called public utility cer- cates, which shall, under no circumstances, be or become an obligation liability of the city or payable out of any general fund thereof, but ll be payable solely out of the revenues or income to be derived from public utility property for the acquisition of which they were issued. ch certificates shall not be issued and secured on any public utility perty in an amount in excess of the cost to the city of such property hereinbefore provided and ten (10) per cent of such cost in addition reto. In order to secure the payment of any such public utility cer- cates and the interest thereon, the city may convey, by way of mort- ge or deed of trust, any or all of the public utility property acquired to be acquired through the issue thereof; which mortgage or deed trust shall be executed in such manner as may be directed by law for acknowledgment and recording of mortgages of real estate, and y contain such provisions and conditions not in conflict with the pro- ions of this Act as may be deemed necessary to secure the payment of public utility certificates described therein. Any such mortgage or ed of trust may carry the grant of a privilege or right to maintain and erate the public utility property covered thereby, for a period not ex- eding twenty (20) years from and after the date such property may me into the possession of any person or corporation as the result of reclosure proceedings; which privilege or right may fix the rates or arges which the person or corporation securing the same as the result foreclosure proceedings shall be entitled to charge in the operation of id property for a period not exceeding twenty (20) years. Whenever d as often as default shall be made in the payment of any public utility, rtificates issued and secured by a mortgage or deed of trust, as aforesaid, in the payment of the interest thereon when due, and any such default all have continued for the space of twelve (12) months after notice ereof has been given to the mayor and comptroller, it shall be lawful r any such mortgagee or trustee, upon the request of the holder or olders of a majority in amount of the certificates issued and outstanding nder such mortgage or deed of trust, to declare the whole of the principal f all such certificates as may be outstanding, to be at once due and payable, nd to proceed to foreclose such mortgage or deed of trust in any court f competent jurisdiction. At a foreclosure sale, the mortgagee or the olders of such certificates may become the purchaser or purchasers of ne property and the rights and privileges sold, if he or they be the highest idders. Any public utilities acquired under any such foreclosure shall be ubject to regulation by the corporate authorities of the city to the same

extent as if the right to construct, maintain and operae such propery had been acquired through a direct grant without the intervention of foreclosure proceedings: *Provided, however,* that no public utility certificates shall ever be issued by any city under the provisions of this Act unless and until the question of the adoption of the ordinance of the city council authorizing the issue thereof shall first have been submitted to the electors of such city and approved by a majority of the qualified voters of the city voting upon such question. The question shall be submitted in such form as the city council may by ordinance designate.

§ 10. The expense of acquiring any such public utility, or the property necessary or appropriate for the operation thereof, or any part thereof, either by purchase, condemnation or construction, or such part of the expense as may be just and reasonable, may in any city be assessed upon and collected from the property and real estate specially benefited thereby, if any, in such manner as is or may be provided by law for the making of special assessments for local improvements in such city.

§ 11. For the purpose of acquiring or constructing wharves, piers, docks, levees, or in connection with such wharves, piers, docks or levees, elevators, warehouses, vaults or necessary and appropriate tracks or terminal facilities, any city may reclaim the submerged lands under any public waters within the jurisdiction of or bordering upon the city, and shall thereupon be vested with the absolute title, in fee simple, to the lands so reclaimed; and for any of the purposes aforesaid the city may require, by purchase, condemnation or otherwise, the title of the private or public owners, if any there be, to lands lying beneath such public waters, and also the riparian or other rights, if any there be, of the owners of the shore lands abutting on such public waters in or over such public waters or the submerged lands under such waters. Nothing herein contained shall give to any city the right to acquire submerged lands as against any park board where any grant has heretofore been made of such submerged lands to any such park board and been acted upon by such board.

§ 12. The charges fixed for the service rendered by it by means of any such public utility by any city shall be high enough to produce a revenue sufficient to bear all cost of maintenance and operation and to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity.

§ 13. Any city, when owning such public utility, shall keep the accounts for such public utility distinct from other city accounts and in such manner as to show the true and complete financial results of such city ownership or ownerships and operation, as the case may be. Such accounts shall be so kept as to show the actual cost to such city of the public utility owned; all costs of mainetnance, extension and improvement; all operating expenses of every description, in case of such city operation; the amounts set aside for sinking fund purposes; if water or other service shall be furnished for the use of such public utility without charge; the accounts shall show, as nearly as possible, the value of such service, and also the value of such

lar service rendered by the public utility to any other city department
ıout charge; such accounts shall also show reasonable allowances for
rest, depreciation and insurance, and also estimates of the amount of
s that would be chargeable against such property if owned by a private
ɔoration. The city council shall cause to be printed annually for public
ribution, a report showing the financial results, in form as aforesaid,
uch city ownership or ownership and operation. The accounts of such
lic utility, kept as aforesaid, shall be examined once each year by an
ert accountant who shall report to the city council the results of his
mination. Such expert accountant shall be selected in such manner as
city council may direct, and he shall receive for his services such com-
sation, to be paid out of the income or revenues from such public utility,
he city may prescribe.

14. This Act shall be deemed and construed to confer powers in
ition to but not limiting those now existing.

15. Whenever the word "city" is used in this Act it shall be con-
ed to include a city, a village or an incorporated town.

APPROVED June 26, 1913.

FILED
OCT 18 1921
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1921.

No. 46.

SPRINGFIELD GAS AND ELECTRIC COMPANY,
PLAINTIFF IN ERROR,

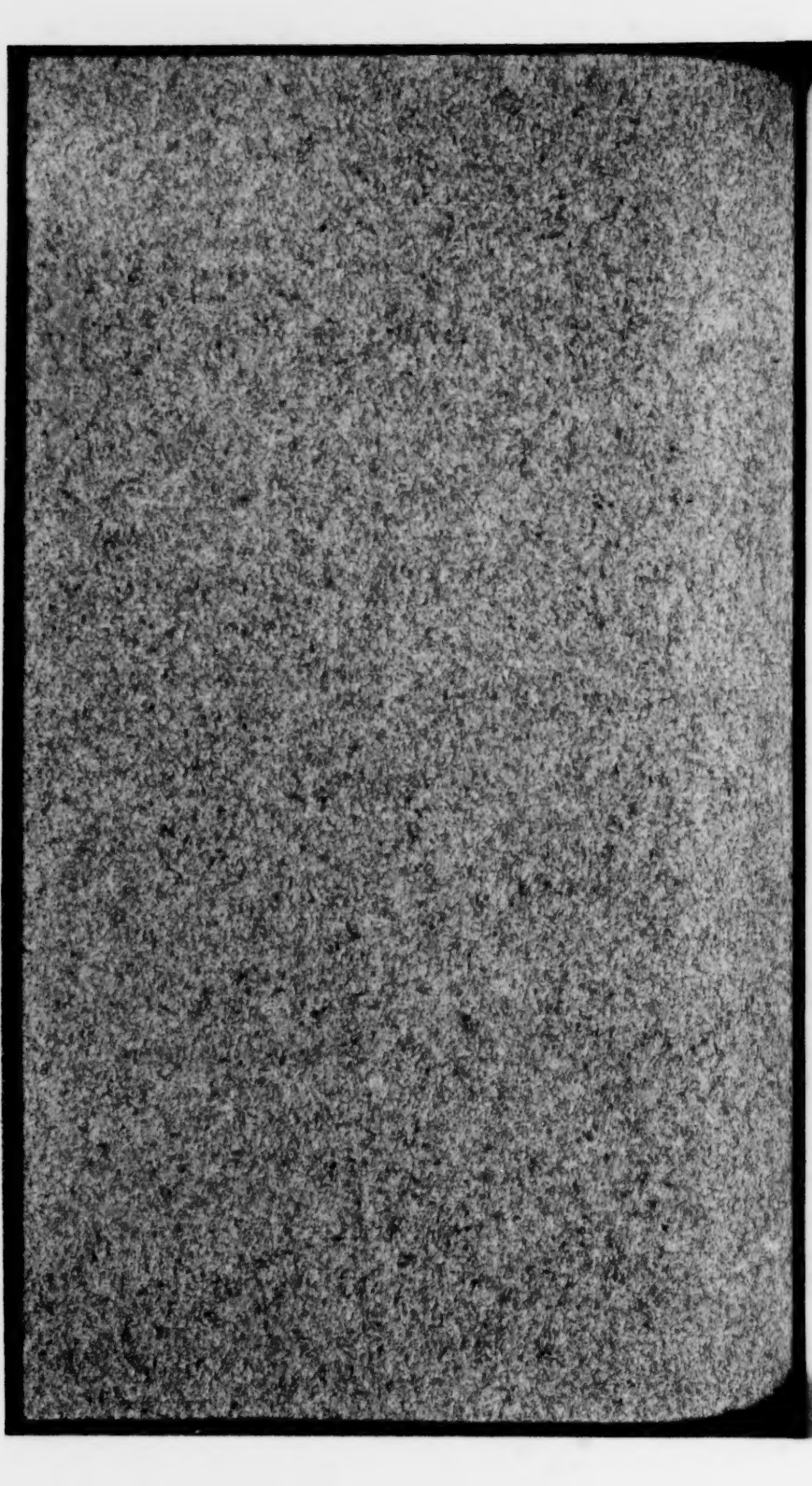
vs.

CITY OF SPRINGFIELD, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT, BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

ALBERT D. STEVENS AND
BAYARD LACEY CATRON,
Solicitors for Defendant in Error.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1921.

No. 46.

SPRINGFIELD GAS AND ELECTRIC COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF SPRINGFIELD, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT, BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

Statement.

The amended bill in this case was filed by the Springfield Gas & Electric Company to enjoin the City of Springfield from operating the municipal electric plant owned and used by the city, either in whole or in part for the production, generation, and distribution of electricity to private con-

sumers for hire or charge, without first having filed schedules of its rates or charges with the Public Utilities Commission, as provided by sections 33 and 34 of the Illinois Public Utilities Act.

The bill alleges that plaintiff is a corporation having charter power and a franchise to own and operate an electric light plant in the City of Springfield, and that prior to June 30, 1913, it constructed in Springfield a plant and has produced electricity therefrom and has complied with the Public Utilities Act; that defendant is a municipal corporation organized under the Cities and Villages Act, and has adopted the commission form of government, and that subsequent to January 1, 1914, it has been producing and selling electricity for the use of private consumers for hire or charge, both within and without the territorial limits of the city, and is a public utility within the meaning of the term used in the Public Utilities Act, but that it claims to be exempt in such operation from said Act by reason of pretended exceptions contained in section 10 of the Act; that such exceptions do not exempt from the Act municipal corporations owning and operating electric light plants for the use and benefit of private consumers for hire or charge, but only excepts therefrom such corporations owning and operating plants, or that portion of such plant, as is used for purely municipal purposes; that appellee is subject to the terms and provisions of said Act, and that if the exceptions in section 10 have the effect of attempting to exempt municipal corporations owning and operating such plants, such exceptions are invalid and void as being in violation of section 22 of Article IV of the Constitution of the State of Illinois and of

the 14th Amendment to the Constitution of the United States.

An answer to this amended bill was filed by the city of Springfield. The answer admitted or denied various allegations of the bill, and disclaimed knowledge of certain other alleged facts and asked for strict proof thereof. The answer also alleged that for many years prior to July 1, 1913, the city had owned and operated an electric light plant, which for about 20 years was located in the city of Springfield; that upon the machinery and equipment becoming worn out and incapable of efficient and economic operation, the city purchased new generators and other equipment and installed the same in the space provided for it in a new building erected by it at the pumping station of the municipal waterworks plant at the Sangamon River, to replace the machinery at the old plant as it became worn out and unfit for use; that the new municipal light plant is operated by means of turbo generators in combination with the waterworks plant at a large saving in the cost of operation, and that a new distribution and lighting system has been installed which is much more efficient and economical in operation than the old system; and that during the entire operation of its municipal light plant, the surplus current produced by it in excess of that required for municipal purposes has been sold to private consumers for hire, and that such sales of such surplus current are not in any way violative or contravention of law.

The answer further denied that the city, in its operation of said plant or sale of current generated thereat, is in any way governed by the Public Utilities Act, or that section 10 of said act is void or in violation of the Constitution of this

State or the United States; and alleges that for many years last past the city has been selling the surplus current of its electric light plant at a reasonable profit and has more applications for such service than it can supply; and denies that the rates actually charged and collected by plaintiff have been filed and published by it in accordance with the provisions of the Public Utilities Act, or that the rates filed by it, as a compliance with said act, are in fact the rates actually charged and collected by it or that it is entitled to any relief as prayed in the amended bill.

Plaintiff in error filed numerous exceptions to the answer, alleging that various portions were impertinent and insufficient, and that it tendered no issue of fact, but a mere issue of law, and should be treated as a demurrer to the amended bill, and prayed that defendant might be compelled to put in a full and sufficient answer, and that the impertinent matter should be expunged.

Upon the hearing on the amended bill, answer to same, and exceptions thereto, the court ordered that the bill be dismissed for want of equity. The plaintiff appealed from that order to the Supreme Court of Illinois and asked that the order be reversed, with directions to the Circuit Court to enter a decree granting the relief prayed for in the amended bill.

In the State Supreme Court, plaintiff insisted that the procedure of the Circuit Court was correct, if defendant is not subject to the Public Utilities Act in the operation of its municipal light plant, but contended that the city is subject to that act, and that the exception referred to in section 10 of the act is void, if construed in such a manner as to exempt municipal plants from the control of the act.

he city contended that the provision in section 10 of Public Utilities Act, which excepts such public utilities e owned or operated by a municipality, is valid and in force and effect, and that under the facts set forth in the and answer in this case, the city, in the operation of its icipal light plant, is not subject to the provisions of said and that therefore the amended bill of complaint was erly dismissed for want of equity.

he Supreme Court of Illinois first held by a majority ion (two judges dissenting) that the exceptions in sec- 10 of the Public Utilities Act were invalid and that city in operating its electric plant was subject to the rol of the Public Utilities Commission (Transcript, pp.). The city filed a petition for rehearing, which was ted, and upon further consideration, the decree of the uit Court was affirmed. In the final opinion of a ma- y of the Supreme Court, it was held that the said ex- ions in section 10 of the Public Utilities Act are valid in harmony with the Municipal Ownership Act, and the city in the operation of its electric plant is not sub- to the control of the Public Utilities Commission.

The plaintiff in error has now brought the record to this rt on the ground that said provisions of section 10 con- ute a violation of the Fourteenth Amendment to the deral Constitution. Assuming that this court has juris- tion of this case, the question here presented is whether, the purposes of regulation, the State may place all pri- ely owned public utilities under the control of a State mmission, and may provide that all utilities owned or rated by a municipality may be regulated and controlled the governing body of the municipality.

BRIEF.

I.

(*a*) The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature, but this intention must be the intention expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts or they would be assuming legislative authority.

36 Cyc., pp. 1106 and 1137, and cases cited.
Eddy vs. Morgan, 216 Ill., 437, 449.
People vs. Kipley, 171 Ill., 44.
Beardstown vs. Virginia, 76 Ill., 34, 40.

(*b*) In the construction of statutes it is the duty of the court to take words found in the statute and to give to each its ordinary, usual meaning, and not to qualify words there found by introducing other words which would change the effect of the act, to make it comport more nearly to what we might think it ought to be.

Eddy vs. Morgan, 216 Ill., 437, 447.
Crozer vs. People, 206 Ill., 464, 469.
People vs. Flynn, 265 Ill., 444, 461.
People vs. J. and St. L. Ry. Co., 265 Ill., 550, 555.
People vs. Painter, 267 Ill., 473, 475.
Bigelow vs. Burnside, 269 Ill., 324, 327.
Frye vs. R. R. Co., 73 Ill., 399, 402.
36 Cyc., pp. 1114-5, and cases cited.
Dwarris on Statutes, Sec. 200, 702.
Cooley on Lim., Sec. 55.

II.

he City of Springfield has power to own and operate an tric light plant and to sell its product within or without limits of the city to private persons or corporations, and ix the rates and charges for services rendered by it and ake all needful rules and regulations in relation thereto, out complying with the provisions of the Public Utili- Act.

Municipal Ownership Act of Illinois, Chap. 111*a*, pars. 1 and 4.

Public Utilities Act of Illinois, Chap. 111*a*, par. 10.

City of Chicago vs. O'Connell, 278 Ill., 591, 601-2.

Springfield Gas & Electric Co. vs. City of Springfield, 292 Ill., 236.

III.

a) The Municipal Ownership Act and the Public Utili- Act were considered and passed practically together at same session of the Legislature, and so far as their pro- ons relate to the same subject matter, said acts should considered and construed together, *in pari materia*, and reby made consistent and harmonious with each other, s to give full force and effect to the provisions of both and to each part thereof.

36 Cyc., pp. 1147, 1151, and cases cited.

Gale vs. Knopf, 193 Ill., 245, 258.

Mette *vs.* Feltgen, 148 Ill., 357, 466-7.

b) The exception of such public utilities as are or may eafter be owned or operated by any municipality, from

the operation and control of the Public Utilities Act, is in complete harmony and conformity with the provisions of the Municipal Ownership Act.

Municipal Ownership Act, Chap. 111*a*, pars. 1-15.
Public Utilities Act, Chap. 111*a*, par. 10.

IV.

(*a*) The regulation and control of municipal public utilities by the municipality, and of privately owned public utilities by the State Utilities Commission, does not constitute improper classification or special immunity, and therefore does not violate either the State or Federal Constitution.

Illinois Constitution, Art. IV, Sec. 22.
Federal Constitution, 14th Amendment.
Tarantina vs. R. R. Co., 254 Ill., 624, 629.
Booth vs. Opel, 244 Ill., 317, 326-7.
Dawson Soap Co. vs. Chicago, 234 Ill., 314.
Douglas vs. People, 225 Ill., 536.
Car Co. vs. Treager, 187 Ill., 9.
R. R. Co. vs. Randley, 183 Ill., 364.
People vs. Com'rs Cook Co., 176 Ill., 576.
People vs. Onahan, 170 Ill., 449.

(*b*) The Legislature may regulate and control public utilities directly under the police power of the State, or it may exercise the power indirectly by conferring the power upon agencies created or designated by the Legislature.

City of Chicago vs. O'Connell, 278 Ill., 591, 603.
P. U. Com. vs. Ry. Co., 275 Ill, 555.
P. U. Com. vs. Monarch Co., 267 Ill., 528, 540.

V.

A public utility constructed and operated by a cipality may be paid for out of corporate funds de- from taxation or otherwise, and is thus impressed with ernmental quality.

Barsaloux vs. Chicago, 245 Ill., 598.
Hews vs. Glose, 170 Ill., 436.
Morgan Park vs. Wiswall, 155 Ill., 262.
Palmer vs. Danville, 154 Ill., 156.

Likewise, the distribution system of a municipal pub- lity at least may be classified as a local improvement, ay be constructed by means of a special assessment, the governmental powers of a municipality.

Village of Grand Ridge vs. Hayes, 271 Ill., 431.
Ewart vs. Western Springs, 180 Ill., 318.

In many other respects a municipality may exercise mental attributes in the construction and operation blic utility for the benefit of its inhabitants, as shown following cases:

Overall vs. Madisonville, 125 Ky., 684.
Sun Print. & Pub. Asso. vs. New York, 152 N. Y., 257.
Holton vs. Camilla, 134 Ga., 560.
Lynn vs. Chambersburg, 160 Pa., 511.
Mitchell vs. Negaune, 113 Mich., 359.
State ex rel. Canton vs. Allen, 170 Mo., 555.
Fawcell vs. Mt. Airy, 124 N. C., 125.

VI.

(*a*) It is a well-established rule that, where the Legislature seeks to impose regulations or restrictions, it may properly exempt those who, although falling within the general class of those regulated and restricted, yet possess some basic, distinctive feature which makes the regulation or restriction in their case needless.

Tarantina vs. R. R. Co., 254 Ill., 624.
People vs. Jones, 280 Ill., 259.
Condon vs. City of Chicago, 249 Ill., 596.
Booth vs. Opel, 244 Ill., 317, 326-7.
Dawson Soap Co. vs. Chicago, 234 Ill., 314.
Douglas vs. People, 225 Ill., 536.
Car Co. vs. Treager, 187 Ill., 9.
R. R. Co. vs. Randley, 183 Ill., 364.
People vs. Com'rs. Cook Co., 176 Ill., 576.
People vs. Onahan, 170 Ill., 449.
12 *Corpus Juris*, 1131.
6 R. C. L., secs. 369, 379.

(*b*) The following authorities also lay down the rules by which courts may test the question whether or not there has been any unlawful discrimination, and apply the rules to the classification made in the cases there under consideration.

Casparis Stone Co. vs. Industrial Board, 278 Ill., 77.
Ives vs. South Buffalo Ry. Co., 201 New York, 271.
Willcox vs. Consolidated Gas Co., 212 U. S., 19.
Flint vs. Stone Tracy Co., 220 U. S. 107.
Ritchie vs. Wayman, 224 Ill., 509.
Keokee Coke Co. vs. Taylor, 234 U. S., 224.
M., K. & T. Ry. Co. vs. May, 194 U. S., 267.

Central Trust Co. vs. Lueders, 221 Fed., 828.
Chicago, I. & L. Ry. Co. vs. R. R. Com. of Ind., 90 N. E. Rep., 1011.
Hawthorn vs. the People, 109 Ill., 302.
State vs. C., M. & St. P. Ry. Co., 41 L. R. A. (N. S.), 524
Brady vs. Mattern, 106 Am. St. Repts., 291.
Norfolk County Water Co. vs. City of Norfolk, 246 Fed., 650.

VII.

(*a*) Where a statute is in part unconstitutional, and the invalid part is of such import that its exclusion from the Act would cause results not contemplated or desired by the Legislature, then the entire Act must be held invalid.

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.
Matthews vs. People, 202 Ill., 389.
Kellyville Coal Co. vs. Harrier, 207 Ill., 624.
Wilkinson vs. Stiles, 76 So., 45.
State vs. Gantz, 124 La., 435; 50 So., 524.
36 *Cyc.*, 976-8.

(*b*) The rule is that where a portion of an Act is void and the court cannot say that the Legislature would have passed the Act with the void portion eliminated, then the entire Act is invalid.

People vs. McBride, 234 Ill., 146, 148.
Cornell vs. People, 107 Ill., 372.
Heinz vs. People, 92 Ill., 406.
People vs. Cooper, 83 Ill., 585.

VIII.

(*a*) A saving clause in an Act is in general merely declaratory of the rules of constitutional law, and where it

appears that the purpose of the Act cannot be carried out if the invalid portion is eliminated, the whole Act is invalid, regardless of the saving clause.

State vs. Bancroft, 148 Wis., 124; 134 N. W., 330.
U. S. vs. Reese, 92 U. S., 214, 543.
Berea College vs. Kentucky, 211 U. S., 45, 54.

(*b*) The saving clause in question here (section 83) relates only to the provisions of the Public Utilities Act as applied to utilities intended to be made subject to that Act, and cannot be applied in such manner as to extend the scope of the Act and thereby include municipalities and public utilities owned and operated by them, contrary to the intention of the Legislature.

Springfield Gas & Elec. Co. vs. City of Springfield, 292 Ill., 236.
6 *R. C. L.*, Sec. 122, page 125.
36 *Cyc.*, pp. 1108, 1143, 1144.

IX.

Repeals by implication are not favored by the courts and are never held unless the two acts are irreconcilable, or the intent to repeal is otherwise clearly expressed, particularly where the two acts relate to the same subject-matter and were passed at the same session of the Legislature.

36 Cyc., pp. 1071, 1077 and 1086, and cases cited.
Village of Ridgway vs. Gallatin Co., 181 Ill., 521, 525.
People vs. Mottinger, 215 Ill., 256, 259.
People vs. Murphy, 202 Ill., 493, 496.
Chicago vs. Oak Park R. R. Co., 264 Ill., 478, 492.

ARGUMENT.

I.

There has been some discussion of the nature and effect of the exceptions to the city's answer to the amended bill herein and the procedure of the Circuit Court upon the hearing thereon. The answer denied various material allegations of the bill, and also showed that the municipal electric-light plant had been owned and operated by the city for its own use for many years prior to July 1, 1913, and that the city had sold its surplus product in excess of the amount required for municipal purpose to private consumers, both before and after that date (Transcript, pp. 12-17).

These conditions were material under the provisions of sections 1 and 4 of the Municipal Ownership Act, and presented a different situation from that set forth in the amended bill, which alleged the operation of a municipal plant for commercial purposes only, without complying with the provisions of the Public Utilities Act after the effective date of that Act, on January 1, 1914.

It is apparent, however, that plaintiff insisted upon the hearing in the Circuit Court, as well as in the State Supreme Court, that the answer was in effect merely a demurrer to the bill and raised only the legal questions which are presented by plaintiff in this court, and that the whole case could be disposed of on that basis without any further proceedings.

Plaintiff is therefore not in a position to complain if the trial court adopted this view and disposed of the case

thereon. The court upon this theory may have considered either that the amended bill was in itself insufficient to present a case for the relief prayed, or that the facts set forth in the answer were considered and should be accepted as true, and that consequently the bill should be dismissed for want of equity.

Therefore the only question now presented to this court is whether or not, under all of the facts disclosed by the amended bill and answer thereto, the City of Springfield may control and operate its municipal electric-light plant, pursuant to the provisions of the Municipal Ownership Act, without being subject to the Public Utilities Act and the domination of the State Public Utilities Commission.

II.

The legislative history of the Municipal Ownership Act and the Public Utilities Act shows that the progress of the two Acts was concurrent, and that they were considered and finally passed together practically as one Act. They were in fact twin Acts, dealing with the two branches of the same subject-matter, and both together presented consistent and harmonious plans for the operation and control of all public utilities.

The Municipal Ownership Act authorizes any municipality in this State to acquire, control, own, and operate any public utility for both municipal and commercial purposes, and to fix the rates and charges for such service to private customers, and to make all needful rules and regulations in relation thereto, upon complying with certain specified conditions, but permits the sale of electricity generated

from any lighting plant owned and operated by the city for its own use, and of water from any water plant owned and operated by the city, without complying with such conditions, and further provides that the Act of any city or village which has heretofore constructed and operated any public utility and furnished and sold the product thereof for private use is declared to be legal and valid.

(Appendix to Plaintiff's Brief, pp. 64-68.)

The Public Utilities Act provides for the appointment and operation of a State Public Utilities Commission, and section 10 expressly provides that the Act applies to all public utilities, except such public utilities as are or may hereafter be owned or operated by any municipality, and further provides that the term "corporation" when used in the Act includes any corporation, etc., "but not municipal corporations."

(Same App., pp. 16-18.)

It will thus be seen that the Municipal Ownership Act provides for the ownership, operation, regulation, and control of municipal public utilities by the municipality, whereas the Public Utilities Act provides solely for the regulation and control of privately-owned public utilities, and expressly excludes municipal public utilities and municipal corporations from the operation and control of said Act. In other words, the Municipal Ownership Act deals with municipal corporations and plants, while the Public Utilities Act deals with private owners and plants. Each Act is complete and exclusive in its own field, and both Acts together cover the entire field of public utilities for all purposes.

III.

A large portion of plaintiff's brief and argument deals with the rights and liabilities of a municipality while operating in a proprietary capacity, as distinguished from its governmental or political capacity. Many authorities are cited and quoted from for the purpose of establishing the distinction or difference between these two capacities of a municipality.

The rule which declares that in owning and operating a public utility for the sale of its product to individuals, a city stands on the same plane as private corporations engaged in the same business, is subject to important limitations. In so doing, a city does in many respects act in a proprietary, rather than a legislative or governmental, capacity; and it is in many instances subject to the same degree of liability toward third persons as is the private company. Notwithstanding this, a wide distinction exists between a public utility constructed and operated by a city and one constructed and operated by a private corporation. When constructed by a city, at least a portion of such utility—*i. e.*, its distribution system—constitutes a local improvement within the meaning of that term as used both in the Constitution (Sec. 9 of Art. IX, Illinois Constitution of 1870) and in the statutes ("Act concerning local improvements," approved June 14, 1897, in force July 1, 1897; chapter on Cities and Villages, Hurd's Ill. Stat.); consequently the cost of construction may be met by the imposition of a special assessment against property benefited whenever it is so constructed

that service may be thereby transmitted to adjoining property and sold.

In the case of *Village of Grand Ridge vs. Hayes*, 271 Ill., 431, the distribution system of a waterworks was held to be such a local improvement when installed for the purpose of furnishing water to adjoining premises for hire. On the other hand, no public utility constructed and operated by a private company can constitute a local improvement, or any part of its cost in any manner be made the basis of a special assessment.

Neither can a public utility privately constructed and operated be paid for out of public funds or funds realized from taxation, while a public utility constructed and operated by a city for the manufacture of service to be sold to its inhabitants may be paid for out of corporate funds, realized from taxation or otherwise.

Barsaloux vs. Chicago, 245 Ill., 598, 612.
Ewart vs. Western Springs, 180 Ill., 318 (Electric distribution system).
Hews vs. Glose, 170 Ill., 436.
Morgan Park vs. Wiswall, 155 Ill., 262.
Palmer vs. Danville, 154 Ill., 156.

This constitutional and statutory recognition vests utilities owned and operated by a municipality for the sale of product or service to its inhabitants with a character of public interest which brings them, in part at least, into the field of matters purely governmental—a quality which is wholly lacking in the case of a utility owned and operated by a private corporation.

The fact that a city, in the operation of a municipal plant for the production of service to be sold to its inhabitants, does not stand on the same plane as a private company producing such service, was recognized by the Supreme Court of Kentucky in the case of *Overall vs. Madisonville*, 125 Ky., 684, in which the court used the following language:

> "It is true the courts generally rest their decisions as to the powers of the municipality to produce and sell light to its citizens, as well as to furnish its own, upon the theory of the dual nature of a municipal government, in which it is part public and part private. This distinction, though, is rapidly disappearing, *and exists now, perhaps, more as a fiction of the law than as a fact.* Towns are now organized for governmental purposes only, no longer for the enjoyment of exceptional privileges granted as a favor by the sovereign. They levy taxes for governmental purposes and can levy them for none other. Hence any expenditure of the public money must be in furtherance of a public benefit in its nature governmental. In this State a great many towns and cities own and operate their own light and water plants. In nearly every instance they furnish light and water to the inhabitants as well as to the public places. In no instance of which we are aware has it been held by any court, or allowed by an act of the Legislature, that a municipality could go into a commercial business purely as an enterprise of gain. It is always allowed or supported by the reason that it has the right to make or store the product for its public use."

In *Sun Printing & Publishing Association vs. New York*, 152 N. Y., 257, an injunction was sought to restrain the city

York from incurring a debt for the construction of a face street railway, on the ground that a debt for such ose violated that clause of the New York Constitution provided: "Nor shall any such county, city, or village wed to incur any indebtedness except for county, city, age purposes." It was contended that the construc- nd operation of a street railroad was not a "city pur- As to this contention the court say:

"We shall not now attempt a definition" (of the term "city purpose"), "except in general terms, further than is necessary to determine the meaning of the acts which we have under review. Generally, we think, the purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the Legislature. * * *

"It" (the street railway) "is necessary for the welfare of the people, and is required by them. It is public in character, and is authorized by the Legislature. Our conclusion is that, under the circumstances and situation here presented, the proposed road may properly be held to be 'for a city purpose,' and that the acts are not in contravention of the provisions of the Constitution."

Holton vs. Camilla, 134 Ga., 560, an injunction was t to prevent the city from embarking upon the business manufacture and sale of ice, on the ground that the ad "no right to embark in a purely private and com- al business of manufacturing or dealing in a common odity of commerce." In passing upon this contention pinion states:

> "The answer of the defendant, which was introduced in evidence and considered upon the trial, states that in the hot climate in which the city of Camilla is situated ice is necessary for the comfort, health, and convenience of its inhabitants. If this is true, why should not the city be permitted to furnish ice to its inhabitants? And if the furnishing of ice to its inhabitants is conducive generally to their health, comfort, and convenience, it is certainly being furnished for a *municipal* or public purpose. * * * We do not think that the operation by the city of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the Constitution referred to in the plaintiff's petition."

Recognition that a public utility owned and operated by a city is to be distinguished from one owned and operated by a private corporation, in that the prime object of the former is the welfare of the inhabitants of the city, and therefore causes such ownership and operation to partake of the nature of a governmental function of the city, while ownership and operation by a private corporation has for its chief purpose the acquisition of monetary gain or advantage to itself, is also to be found in the following cases:

Lynn vs. Chambersburg, 160 Pa., 511.
Mitchell vs. Negaune, 113 Mich., 359.
State ex rel. Canton vs. Allen, 170 Mo., 555.
Hequenborg vs. Dunkirk, 49 Hun. (N. Y.), 550.
Fawcell vs. Mt. Airy, 124 N. C., 125.

In each of the above cases expenditures of money for public utilities to be owned and operated by cities for the pro-

on of service to be sold to the inhabitants was held to within provisions limiting city expenditures to "public ses" and "city purposes." The recognition which cases give to the existence of a difference in the primary t and purpose of municipally conducted utilities and controlled by private corporations is supported by com- knowledge of the general situation. There is a radical rence in the nature of the ownership. The municipal is owned in common by the citizens of the community, no possibility of a direct money return to any indi- ai as a common owner, and in addition is owned in part ast by the very consumers themselves. Whereas the kholders in the privately owned plant look solely to lends from its operation, the common owners of the icipally owned plant receive no direct financial return their ownership and regard it as in the nature of a perative enterprise.

the case of a municipally owned and operated utility e is also an entire absence of any personal money gain lvantage on the part of the members of the city council, ontrasted with the position of the members of the board directors of the private utility corporation. The former selected and put into office, not with a view to securing a business concern the largest return and profit which be realized from a business enterprise, but as representa- s of the people of the city for the management and carry- on of affairs of common interest to the inhabitants of city. They must necessarily be residents of the commu- ; they are chosen at short intervals, not by stockholders rested solely in dividends, but by the citizens of the ire community, among whom are the patrons of the

utility. Any incentive to impose upon the patrons of the utility is entirely lacking. On the contrary, any deviation from strict equity between the utility on the one hand and the patrons on the other would naturally be in favor of the patrons.

The foundation of the plaintiff's brief and argument in this case is a similarity assumed to exist between municipal and private corporations with respect to the likelihood of their imposition upon their patrons. This assumption entirely overlooks inherent and fundamental differences between these two classes of corporations with respect to the need for their regulation in the interests of the public, which warranted the Legislature in placing the regulation of the one in the financially disinterested members of the city council, in the choosing of whom the patron himself participates, and the other in a disinterested commission, for the protection of the patron from the natural desire for personal gain on the part of a board of directors, in whose selection he has no voice and whose members are chosen almost solely with reference to their ability to procure returns, which must be realized, if at all, at the expense of the patron.

It is a well-established rule that where the Legislature seeks to impose regulations or restrictions, it may properly exempt those who, although falling within the general class of those regulated and restricted, yet possess some basic, distinctive feature which makes the regulation or restriction in their case needless. This rule was very clearly enunciated in the case of *Tarantina vs. R. R. Co.*, 254 Ill., 624. In that case the court construed the Illinois Act of 1911, forbidding the drinking of liquor on trains. That Act prohibited the drinking of intoxicating liquor in or upon any railroad

king car, parlor car, day coach, interurban car, or ca-
e car in the use of transportation of passengers, but did
prohibit such drinking in the dining, buffet and sleep-
cars, and the Act was challenged as unconstitutional for
pting the latter from its operation. The court pointed
that the railroad companies were themselves in a posi-
to control the drinking of intoxicating liquor on buffet
dining cars, and that travel upon sleeping cars might
be of such a different character that the need for the
hibition did not exist, and held the exceptions proper.
In the case of *People vs. Jones,* 280 Ill., 259, the Act was
ain attacked upon the same ground as that advanced in
Tarantina case, and the court again upheld the Act as
nstitutional. The exception was held valid on account
a difference in the character and surroundings of the
ssengers, although the act of drinking liquor was the same
any case.

In *Condon vs. City of Chicago,* 249 Ill., 596, the court
cognized a distinction between cities and private corpora-
ons or persons, by upholding a law providing different
ethods for the enforcement by third persons of liabilities
similar nature.

In that case the statute requiring notice to be given in-
rporated cities, villages, or towns of an intention to bring
action for damages for personal injury against it was
pheld, although there was no such statute applicable to
rivate corporations, and the court, at pages 600-601, say:

> "Municipal corporations are bodies politic created for the purpose of administering the affairs of the incorporated territory. They exercise the powers of local government delegated to them by the Legisla-

> ture and are instruments of the State for that purpose. Their funds are derived from taxation and their affairs are administered by officers elected for comparatively short terms and by the appointees of such officers. Their affairs cannot be conducted by the same rules which govern the business of a private corporation managed and conducted by its owners, with its own funds, under a continuous management. *It is essential to the public interests, to economy and the protection of public funds, that rules should be established governing the transactions of such bodies different from those which apply to the affairs of individuals and corporations, and these different conditions form a sufficient basis for the legislation here brought in question.*"

It will be noted that the statute here upheld applies to actions for injuries received through the operation of a city in its proprietary capacity, as well as those received through its operation in a purely governmental capacity.

There was no difference in the *Condon* case between the municipal corporation and the private corporation, in any substantial right; each would have been equally liable for the negligence resulting in the injury; nevertheless, the court holds that in the regulation of the exercise of the remedy for such injury, municipal corporations may be placed in a different class from private corporations.

IV.

Counsel for plaintiff in error have sought, by the use of italics in short excerpts quoted from opinions by this court and other courts, to give a restricted meaning to such

words as "act" and "business," which is unwarranted by the context. We know of no case limiting the general rule given in 8 Cyc., 1052, as follows:

> "Peculiar circumstances which surround particular persons or corporations are ample grounds for holding laws which discriminate for or against them valid."

This rule is also laid down in 12 *Corpus Juris,* 1131 as follows:

> "Peculiar circumstances which surround particular persons or corporations are ample grounds for holding laws which discriminate for or against them valid, and the classification is not invalid because not depending on scientific or marked differences in things and persons or in their relations, provided it is based on a practical distinction."

In 6 R. C. L., section 369, it is said:

> "In determining the legality of classifications for legislative regulation, the subject to be regulated, the character, extent, and purpose of the regulation, and the particular classification and regulation adopted by the statute should be considered."

In the same volume, section 379, it is further said:

> "The classification of persons may be made according to their personal fitness to carry on particular business."

In each of the cases of *Booth vs. Opel,* 234 Ill., 317; *Car Co. vs. Treager,* 187 Ill., 9; *R. R. Co. vs. Randley,* 183 Ill., 364; *People vs. Com'rs Cook County,* 176 Ill., 576, and *People*

vs. Onahan, 170 Ill., 449, the *act* or *business* engaged in by those bodies which the Legislature put in separate classes was identically the same—*i. e.*, the levying of taxes—and the basis of the classification was a difference in the needs of the respective bodies themselves.

In the case of *Dawson vs. Chicago*, 234 Ill., 314, the *act* or *business* was the same—mob violence in cities and in villages—and the distinguishing feature pertained only to those classified, and not at all to the act or business.

So in the case of *Douglas vs. People*, 225 Ill., 536, the basis of the classification existed only in differences existing between those engaged in "business" relating to plumbers, and not based on any assumption that plumbers carried on their work in one place differently from that in another place.

In plaintiff's brief, reference is made to cases from a number of States, which are said to "definitely and unqualifiedly" hold that in owning and operating a public utility a municipal corporation "assumes a separate and distinct character from that of soverign;" that it "in no sense" performs a governmental function, and that those rights and obligations are governed by the "same" rules as apply to private corporations.

Assuming for the argument that these propositions are sound, in what respect can they be said to alter the fact that basic differences exist between municipally owned and privately owned utilities in that public money, in which no individual has a direct monetary interest, finances the one, while private money, invested solely because of expected money return, finances the other; that a large number of the

contributors to the capital of the one are also its patrons, while in the other they are not; that one is under the control of and governed by a body of men elected at short intervals by the public, including the patrons, to whom is committed the legislative power of the city and in whom might properly be vested the regulation of *all* local utilities, private as well as public, while the other is controlled by directors, chosen by stockholders largely with reference to their ability to produce profits, to whom experience has shown and the Legislature has said regulation cannot be safely entrusted?

In contending for the narrow rule which limits the ground of classification to the "act" or "business," counsel for plaintiff have overlooked the rule above noted, that "peculiar" circumstances which surround particular persons or corporations are ample grounds for holding laws which discriminate for or against them valid.

When analyzed, the propositions urged by plaintiff will be found either to have no material bearing on the issue here raised or not to be supported by the authorities mentioned. The first—that a city in owning and operating a utility assumes a separate and distinct character from that of a sovereign—means nothing, unless there is no intermediate ground between "sovereignty" and "private ownership and operation" which will warrant classification for regulatory purposes. None of the cases to which counsel allude goes to the extent of holding that *no* difference in character exists between municipally owned and privately owned utilities in that respect. Neither do any of them hold that municipal ownership and operation cannot *in any degree* be said to fall within the field of governmental functions;

nor do any hold that "in every respect" municipal and private ownership must be governed by the "same" rule.

All that is held in any and all of these cases is that cities in owning and operating utilities are *in some respects* assuming a character separate and distinct from sovereignty; that *in some respects* they are not performing peculiarly governmental functions in so doing, and that *as to certain features* they have the same rights and obligations as private corporations. Opposing counsel have pointed out no case expressly excluding all characteristics of sovereignty from municipal ownership and operation of utilities or expressly holding either municipally owned or privately owned utilities to be governed by *all* the rules governing the other.

V.

The following authorities lay down the rules by which the courts test the question whether or not there has been an unlawful discrimination. We submit that they show that many statutes have been upheld where there was even more ground to claim that the classification was discriminatory than in the case at bar.

In *Casparis Stone Co. vs. Industrial Board*, 278 Ill., 77, the following general rules were laid down at pages 80 and 81:

> "Under the doctrine of equal protection of the laws, class legislation is prohibited by the Federal Constitution, but there is no prohibition against a reasonable classification of persons and things for the purpose of legislation (*Gulf, Colorado and Santa Fe Railway Co. vs. Ellis*, 165 U. S., 150). Such

classification, however, must not be capricious or arbitrary, but must be reasonable and natural and based upon some principle of public policy; but if the classification is not wholly unreasonable and arbitrary and the statute is uniform in its operation on all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the Federal Constitution (*American Sugar Refinery Co. vs. Louisiana*, 179 U. S., 89; 6 R. C. L., 374, 378, 379). In the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the State is permitted a wide range of discretion. *The question of classification is primarily for the State Legislature and only becomes a judicial question when the legislative action is clearly unreasonable* (*Magoun vs. Illinois Trust and Savings Bank*, 170 U. S., 283). The provisions of the Constitution with reference to due process of law and equal protection of the law merely require that all persons subjected to such legislation shall be treated alike under like circumstances and conditions (*Central Lumber Co. vs. South Dakota*, 226 U. S., 157). The reasoning of these decisions as to classifications under the various State laws has been repeatedly approved by this court (*City of Chicago vs. Schmidinger*, 243 Ill., 167; *City of Chicago vs. Bowman Dairy Co.*, 234 *Id.*, 294; *Ritchie & Co. vs. Wayman*, 244 *Id.*, 509; *People vs. Henning Co.*, 260 *Id.*, 554)."

In *Ives vs. South Buffalo Ry. Co.*, 201 New York, 271, the court, at page 290, said:

"The appellant contends that the classification, in this statute, of a limited number of employments as dangerous, is fanciful or arbitrary, and is therefore

repugnant to that part of the Fourteenth Amendment to the Federal Constitution which guarantees to all our citizens the equal protection of the laws. Classification, for purposes of taxation *or of regulation under the police power, is a legislative function with which the courts have no right to interfere, unless it is so clearly arbitrary or unreasonable as to invade some constitutional right. A State may classify persons* and objects for the purpose of legislation, provided the classification is based on proper and justifiable distinction (*St. John vs. New York*, 201 U. S., 633; *Missouri Pac. Ry. Co. vs. Mackey*, 172 U. S., 205; *Minneapolis & St. L. Ry. Co. vs. Herrick*, 127 U. S., 210; *Chicago, K. & W. R. R. Co. vs. Pontius*, 157 U. S., 209), and for a purpose within the legislative power."

In *Willcox vs. Consolidated Gas Co.*, 212 U. S., 19, the court said, at page 54:

"Lastly, *it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given.*"

In *Flint vs. Stone Tracy Co.*, 220 U. S., 107, the court upheld a classification between private firms or individuals on the one hand and corporations on the other for the purpose of the excise law.

In *Ritchie vs. Wayman*, 224 Ill., 509, the court upheld the ten-hour labor law, notwithstanding the objection that it discriminated between men and women.

In *Keokee Coke Co. vs. Taylor*, 234 U. S., 224, the court, on page 227, said:

"It is more pressed that the Act discriminates unconstitutionally against certain classes. But, while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a *statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the Legislature to judge, unless the case is very clear* (*Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S., 61, 81; *Central Lumber Co. vs. South Dakota*, 226 U. S., 157, 160; *Patsone vs. Pennsylvania*, 232 U. S., 138, 144). The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise *is not enough to overthrow a law that must be presumed to be deemed by the Legislature coextensive with the practical need.*"

In *People vs. Jones*, 280 Ill., 259, the court quoted from *Missouri, Kansas & Texas Railway Co. vs. May*, 194 U. S., 267, as follows (280 Ill., 262):

"When a State Legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legis-

> latures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

In *Central Trust Company vs. Luckers & Co.*, 221 Fed., 828-829, the United States Circuit Court of Appeals for the Sixth Circuit said, on page 831:

> "The rule is well settled that the equal protection clause of the Fourteenth Amendment does not take from the States the power to classify the subjects of legislation, but leaves to the legislatures a wide field of discretion in that regard, avoiding such classification only when unreasonable and arbitrary, and that *a legislative classification is presumed to be reasonable unless it is apparent that there was and could be no reasonable basis therefor* (*Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S., 61, 73-78; 31 Sup. Ct., 337; 55 L. Ed., 369; Ann. Cas. 1912C, 160, and cases there cited; *Jeffrey Mfg. Co. vs. Blagg*, 235 U. S., 571, 577)."

In *Chicago I. & L. Ry. Co. vs. Railroad Commission of Indiana*, 90 N. E. Reporter, 1011, in upholding the putting of railroads in one class and interurban railroads in another, the court, on page 1012, said:

> "There is no doubt but that the Legislature has the authority to classify the subjects of legislation when there is such difference in the situation or condition of things of the same general kind that a general law cannot, in the opinion of the legislative body, be made justly applicable alike to all. The other limitation upon the legislative power to make such classification is that the cause for it must not be capricious,

but rests upon some substantial ground or reason existing in and arising from the subject-matter, and that the law passed in pursuance of such classification be so framed as to operate alike upon all within the class. When such reason appears to exist, the propriety of classification is purely a legislative question (*Indianapolis, etc., Co. vs. Kinney,* 171 Ind., 612; 85 N. E., 954; *Bedford Quarries Co. vs. Bough,* 168 Ind., 671; 80 N. E., 529; 14 L. R. A. (N. S.), 418; *Pittsburgh, etc., Co. vs. Montgomery,* 152 Ind., 1; 49 N. E., 582; 69 L. R. A., 875; 71 Am. St. Rep., 301; *Indianapolis vs. Navin,* 151 Ind., 145; 47 N. E., 525; 51 N. E., 80; 41 L. R. A., 337-344; *Railroad Co. vs. Savannah,* 198 U. S., 392; 25 Sup. Ct., 690; 49 L. Ed., 1097; *Cotting vs. Kansas City Stockyards,* 183 U. S., 79; 22 Sup. Ct., 30; 46 L. Ed., 92; *Sugar Refining Co. vs. Louisiana,* 179 U. S., 89; 21 Sup. Ct., 43; 45 L. Ed., 102)."

In *Hawthorn vs. The People,* 109 Ill., 302, the court said page 307:

"Where a law, therefore, is found on the statute books, the presumption is that it conforms to the Constitution. This presumption arises from the fact that each member of both houses who pass the law, and the Chief Executive, who has approved it, are under the same obligation to support the Constitution as are the courts.

"Having performed all acts necessary to the adoption of the law, we must presume they acted in view of the Constitution and all of its limitations. *For these reasons the courts never interfere to declare a law unconstitutional in case of doubt.* To authorize such action by the court, it must be clear the law

violates some provision of the organic law. *When, therefore, a law is challenged as unconstitutional, we must be able to turn to the provision of the instrument which prohibits the Legislature from its enactment, and the repugnancy must clearly appear.*"

In 12 *Corpus Juris* (at pages 1112-1113) it is said:

"Constitutional provisions forbidding the grant of special privileges or immunities to citizens or individuals, or corporations have been construed as not forbidding the grant to municipal corporations of privileges or immunities not given to individuals or to private corporations. Thus, a statute may provide that all transitory actions against municipal corporations of a certain class shall be brought in the counties in which such corporations are situated, may prescribe a shorter period of limitations for actions against cities than for actions against individuals, and may make it a condition precedent to recovery against a city for injuries that notice of the same be given the city within a certain number of days, although similar causes when brought against individuals are not similarly restricted. Constitutional prohibitions of special privileges do not forbid the enactment of general laws applicable only to municipal corporations of a particular class, or even the grant of a particular power of a public nature to a particular municipal corporation. But a statute or charter may not exempt a municipal corporation from a liability imposed by a general rule of law to which other such corporations remain subject, and a constitutional prohibition against the grant of privileges or immunities which shall not equally belong to all citizens, although evidently enacted to restrict the Legislative Assembly, also operates as a limitation on the council of a municipality."

n *State vs. Chicago, Milwaukee & St. Paul Railway Co.*, L. R. A. (N. S.), 524, the Supreme Court of Minnesota , near the bottom of the first column on page 527:

> "If *it is not unlawful discrimination to require a lower rate of a public service corporation when the service is rendered for a city than when the same service is rendered for any inhabitant of such city*, it would seem to follow that a State may, if its conscience permits, establish a lower rate for itself than the maximum rate it permits the common carriers to charge the public generally."

n *Brady vs. Mattern*, 106 Am. St. Repts., 291 (125 Ia.,), the court upheld a statute based on the discrimination ween incorporated and unincorporated building and loan ciations.

n *Norfolk County Water Co. vs. City of Norfolk*, 246 l., 650, the United States Circuit Court of Appeals, Fourth cuit, said, on pages 652-653:

> "The presumption in favor of the constitutionality of a statute embraces presumption that the Legislature intended to be just and to promote the public welfare, and that it investigated and found some reasonable basis of distinction and classification warranting the apparently unequal burden imposed or unequal exemption allowed by the statute. The strength of these presumptions is growing in judicial conception. The difficulty is in the application of these general rules for determining the limit of the protection of the Fourteenth Amendment. Two late cases are illustrative of discriminations that fall without and within the protection of the Constitution. The State may create tax districts and apportion the

burdens of taxation, though unequal, without violation of the Fourteenth Amendment, unless the apportionment is palpably arbitrary and a plain abuse (*Houck vs. Little River Drainage District*, 239 U. S., 254; 36 Sup. Ct., 58; 60 L. Ed., 266). But a scheme of taxation which subjects without reason owners of property having greater depth than that adjoining to greater and disproportionate taxation is unconstitutional. *Gast Realty, etc., Co. vs. Schneider, etc., Co.*, 240 U. S., 55; 36 Sup. Ct., 254, 255; 60 L. Ed., 523.

"It cannot be said that the statutory distinction was arbitrary, in allowing the City of Norfolk to extend its water system on the Norfolk side of the Elizabeth river, with the incidental unrestricted competition with the complainant while burdening such extension to the Portsmouth side within three miles of the City of Norfolk with the condition that it should acquire the property of the water companies operating in that territory."

VI.

Section 1 of the Municipal Ownership Act authorizes cities "to fix the rates and charges for the services rendered by such public utilities" owned by them, and "to make all needful rules and regulations in relation thereto" (Appendix to Plaintiff's Brief, p. 64).

The provisions of this section are brief but comprehensive. The city is given not only the right to own and operate public utilities, but also the right to regulate and control them. This Act is a grant of charter powers. The duty is coextensive with the power granted and cannot be avoided. Where an Act grants power to do certain things, conditions

ler which such power may be exercised must be complied
h, when not otherwise provided.

The nature of the supervision and regulation required for
blic utilities owned or operated by a municipality is
arly indicated by the provision of section 12 of this Act,
ich provides as follows:

> "The charges fixed for the services rendered by means of any such public utility by any city shall be high enough to produce a revenue sufficient to bear all cost of maintenance and operation and to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity."

In order that adequate charges may be fixed for the pur-
es required and that there may be proper supervision of
h public utilities, section 13 of this Act further provides
t such city shall keep separate accounts of such public
lity, showing the cost of same and of maintenance, exten-
n and improvement, operating expenses, sinking fund,
vices furnished and the value of same, reasonable allow-
es for interest, depreciation and insurance, estimates of
es chargeable to such property if privately owned, and
t the city council shall cause a report showing such finan-
l results to be printed annually for public distribution,
l that such accounts shall be examined annually by an
ert accountant, who shall report to the city council the
ults of his examination (Hurd's Ill. Stat., Chap. 111*a*,
s. 12 and 13).

The purpose of the above provisions was clearly to furnish to the city council and to the public, including the consumers, full detailed information in regard to the cost, equipment, product, distribution, and condition of the municipal plant as a basis for determining and fixing just and adequate rates and imposing reasonable rules and regulations for the supervision of the business. By publishing and distributing annual reports of these facts and conditions, the consumers are enabled to ascertain whether the rates and service are reasonable and equitable, and, if not, they may apply to the city council for relief, or present to a competent court their grievances based on the facts disclosed by the accounts and reports.

A dual character is thus imposed upon municipalities with respect to public utilities owned or operated by them. The city not only operates the utility owned by it in an administrative capacity, but also provides for its regulation and supervision by ordinances enacted by its city council. In other words, the city not only owns and operates its public utilities through its administrative officers, but regulates and supervises such utilities by means of its legislative body.

Inasmuch as all ordinances must be lawful, and in order to be lawful must be reasonable, the "rates and charges" which the city is empowered to fix, and the "needful rules and regulations" which it is required to make, must therefore be reasonable. If it should appear that any unreasonable rate, rule, regulation, or charge should be imposed, or discrimination or extortion should be practiced under the ordinances, the matter could be presented to the city council or to the court, with full information furnished by the ac-

counts and public reports for correcting any error or abuse and requiring proper and reasonable rates, rules, and regulations to be provided and enforced.

It thus appears that this statute provides machinery for the supervision and regulation of municipal public utilities by the city council, which is thereby enabled to exercise full and complete control over the operation of such public utility and its relations to the consumers or patrons of its product and with the public generally. This supervision and control, so far as required by the conditions, is analogous to the supervision and control of privately-owned public utilities under the Public Utilities Act.

Counsel for plaintiff in its brief recite in some detail the requirements of the Public Utilities Act with respect to the regulation of public utilities under it. These provisions are particularly specified by the Act, evidently by reason of the fact that the duties under the Act and the powers of the Commission must necessarily be clearly defined in dealing with private corporations and individuals and the interests involved. Manifestly the same detailed provisions are not required in dealing with municipal public utilities under the Municipal Ownership Act, in which general power and authority is given for regulating and supervising such utilities by the city council. Under this general power, the city council is authorized to enact detailed rules and regulations by ordinances, just as is done under other general delegations of powers to the city council by various other acts.

The Illinois Supreme Court held that the Legislature intended that public utilities owned or operated by municipalities should not be under the supervision of the Public Utili-

ties Commission or subject to its authority. Such intention is manifest not only from the provisions of this Act, but also from the provisions of the Municipal Ownership Act, which clearly provide for the regulation and supervision by the city council of public utilities owned or operated by a municipality.

The authority to regulate State public utilities is vested in the Legislature, which might have given each city the power to regulate all public utilities within the municipality. In fact, this has since been done by the Illinois Commerce Act, which repealed the Public Utilities Act and was substituted in its place as to public utilities under its jurisdiction and control (Session Laws of Illinois, 1921, p. 748, Art. VI).

There may be some question as to the propriety of authorizing a city which owns or operates a public utility to regulate and supervise a privately-owned utility engaged in producing and selling the same product in such municipality. This may well have been one of the reasons which induced the Legislature to limit the power of regulation by a municipality to utilities owned or operated by it, and to vest the power of regulating all other utilities in another agency, such as the State Commission.

Plaintiff in error entirely overlooks the fact that under the Municipal Ownership Act full power and authority is vested in the municipality to adopt rules and regulations for the supervision and control of public utilities owned or operated by it. This power must necessarily be exercised by the municipality by ordinances duly enacted by the city council, whereby rules and regulations are adopted which must apply to all consumers alike under the same condi-

tions. The individual consumers are therefore not subject to the whim or arbitrary action or discrimination of the city officials operating such public utility, but are under the protection of the legislative body of such municipality.

It would hardly seem necessary to cite authorities to show that the regulations adopted by the city council of a municipality must be free from discrimination, extortion, and impositions and must be in all respects reasonable and just. If not, the consumer would have a clear legal remedy by applying to a competent court, which would grant proper relief under the circumstances. Consequently, the consumer would not be required to rely merely on an uncertain remedy by political action, but would have the same right to apply first for relief to the city council and then to the courts, as the consumers of a privately owned plant would have to apply first to the Public Utilities Commission and then to appeal to the courts.

The question is asked whether the difference in ownership is a reasonable basis, having reference to the purpose of the legislation, for the assumed difference in privilege. We respectfully urge that there is no difference in principle in the regulation of a municipally-owned public utility by the municipality under the Municipal Ownership Act and the regulation of a privately-owned public utility by the State Commission under the Public Utilities Act. There is however, a vital difference in the character of the ownership and operation of such respective public utilities, which forms a reasonable and just basis for the selection of different agencies to exercise such supervision and control.

This difference was clearly recognized by the Legislature

in adopting the provisions of these two Acts. The city council is the governing body of the municipality, composed of representative citizens who are concerned solely in carrying out their public functions and duties. There would be just as much reason for holding the legislative body of the State unfit to enact laws for the regulation and control of public utilities of the State as to hold that the legislative body of the city or municipality is unfit to enact proper rules and regulations by ordinance for the regulation and control of the public utilities of the municipality.

On the other hand, the citizens of a municipality have no voice in the selection of the governing body of privately owned public utilities. Such owners are private corporations controlled by officials who are often non-residents, not only of the municipality, but of the State in which the public utility is located. In any event, they are engaged in the business solely for profit, and have every incentive to increase the profits from the operation of the business, which can be best realized by an increase in the rates and charges and a decrease in the quality of the product or character of the service rendered. It was this natural tendency of private ownership and operation which produced extortionate charges, inferior service, and unfair discrimination and led to the enactment of the Public Utilities Act for the strict regulation and supervision of such public utilities.

On the contrary, the well-known and natural tendency of municipal public officials, elected by popular vote and without any direct financial interest in the municipal public utilities, to favor the consumers by providing service at rates *too low* to sustain the plant and business required different means of regulation and control, as provided for by the

Municipal Ownership Act. This Act requires correct method of accounting, auditing, and publishing the accounts and conditions as a basis for fixing adequate rates *high* enough to provide proper service and produce a fair return for the product furnished.

VII.

Counsel for plaintiff in error insist that the provisions of the Public Utilities Act excepting municipal corporations and utilities owned or operated by them may be eliminated, and by that process make the Act apply to municipal corporations and such public utilities, notwithstanding the Legislature positively expressed its intention that the Act should not apply to such corporations and utilities.

In so contending, counsel seek to apply the general rule as to the elimination of unconstitutional provisions, but overlook the settled limitations upon that rule, one of which is that the rule does not apply—

> "Where the invalid section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature."

The general rule, with its limitations, is stated in 36 Cyc., 976-8, as follows:

> "It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. The rule is, however, subject to several important limitations, and the whole statute will be declared invalid where

> the constitutional and unconstitutional provisions are so connected and interdependent in subject-matter, meaning, and purpose that it cannot be presumed that the Legislature would have passed the one without the other; *and where the invalid section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature*, where the obnoxious part is the consideration and inducement of the whole Act, or where the constitutional parts are ineffective and unenforceable in themselves, in accordance with the legislative intent."

The limitation we have emphasized *supra* has been specifically applied by this Court, the Supreme Court of Illinois, and other courts to cases like that at bar, where the Legislature has excluded from the operation of a statute one or more classes of persons, thereby creating an unconstitutional discrimination. The reason is that the courts can exercise judicial and not legislative functions, and that making a statute apply to a class of persons to which the Legislature expressly enacted it should not apply is *enacting* a law—not construing, enforcing, or passing upon the validity of a statute.

We desire to call attention here to a few of the decisions referred to as follows:

In the case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, which went up from the northern district of Illinois, the court held the Illinois Anti-Trust Act unconstitutional on the ground that agriculturists and stock-raisers were exempted by the ninth section.

This court said in that case, beginning at the bottom of page 564 and continuing on page 565:

"We therefore hold that the Act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the Act in operation.

"The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative. The first section of the Act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to agriculturists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as

> denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

The *Connolly* case was followed by the Illinois Supreme Court on this point in *Mathews vs. People*, 202 Ill., 389.

In the *Mathews* case there was before the court the Act for creating free employment offices in cities of designated populations. By section 8 employers whose employees were on strike or locked out were excluded from its operation, and for that reason the Act was held to be unconstitutional. The court held that section 8 could not be eliminated and the rest of the Act allowed to stand, thereby making it apply to all employers, because that would produce a result not intended by the Legislature. The court said, at pages 405-6:

> "It is claimed, however, by the Attorney General, that section 8 can be eliminated from the Employment Act without invalidating the rest of the Act. Undoubtedly, 'if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative' (*Connolly vs. Union Sewer Pipe Co., supra*). In the *Connolly* case it was held by the Supreme Court of the United States, that the exception, contained in section 9 of the Illinois Act of 1893, made the whole Act invalid. Upon this subject the Supreme Court of the United States there say: 'The first section of the Act here in question embraces by its terms all persons who combine their capital, skill

or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to agriculturalists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking, then, at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute, unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is, that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional, as denying the equal protection of the laws to those within its jurisdiction, who are not embraced by the ninth section.'

"In the case as bar, if section 8 be eliminated from the Employment Act, the other sections without it would cause results not contemplated or desired by the Legislature. This is so, because, without the obnoxious clause or section, all employers, including those whose workmen are out upon a strike or are locked out, as well as all others, would be entitled to the benefits of the Act. But clearly it was the intention of the Legislature, by inserting section 8 in the Act, to deprive the class of employers therein named of the benefits of the Act. Consequently, the elimination of that section would not be in accordance with the manifest intention of the Legislature. An

> elimination of section 8 would make the Act apply to all classes of employers, and thereby cause a result evidently not contemplated or desired by the Legislature. If all the sections of the Act be construed together, it is evident that the Legislature would not have created the free employment agencies in question, unless the class of employers, mentioned in section 8, were excluded from the operation of the Act. It follows that the Employment Act of April 1, 1899, must be regarded as unconstitutional as an entirety."

In *Kellyville Coal Co. vs. Harrier*, 207 Ill., 624, the question was as to the right of an employer to a set-off in a suit by his employee for wages. The statute on which the employee relied was held to be unconstitutional because of section 6 thereof, as follows:

> "Nothing in this Act should be so construed as to include the business of farmers, or farm laborers, or servants."

The court was asked to eliminate that section and construe the Act to include the business "of farmers, farm laborers, and servants"; but the court said, at pages 628-9:

> "It is, of course, conceded that sections 1 and 2 of the Act are in violation of the Constitution, but it is insisted that sections 3 and 4 should be upheld. We do not see how that can be done, and must hold that the whole Act is void. Section 6 of the Act is as follows: 'Nothing in this Act shall be so construed as to include the business of farmers, or farm laborers, or servants.' A large proportion of the employers of labor in the State are farmers, and the valuable right

of set-off is allowed to them while it is denied to the miner or manufacturer. A farmer whose employee is indebted to him, if sued by the employee, may set off the amount of such indebtedness against the demand of the employee for wages, and the recovery can only be for the balance due. The employee of a miner or manufacturer is not limited to the recovery of the balance due him, but may have a judgment for the whole amount of his wages, and the employer is relegated to a separate action at law to collect what is justly due him, if he can. By this discrimination the miner and manufacturer are deprived of the equal protection of the laws guaranteed to them by the Federal Constitution. It is too plain for argument that the exemption of farmers, farm laborers and servants was a material consideration with the Legislature in the passage of the Act, and that it would not have been enacted if they had not been excluded in its operation and protected from its provisions. The whole Act is therefore void (*Connolly vs. United States Sewer Pipe Co.*, 184 U. S., 540; *Mathews vs. People*, 202 Ill., 389)."

The Legislature very clearly indicated its intention to exde municipal corporations from the operation of the Pub- Utilities Act, and both the majority and minority opins of the Illinois Supreme Court recognize such intention *pringfield Gas & Electric Co. vs. City of Springfield*, 292 , 236).

Furthermore, the court in *City of Chicago vs. O'Connell*, 8 Ill., 291, also recognized such intention, saying, at pages 1-2:

"Section 10 of the Public Utilities Act provides that the term 'public utility,' when used in the Act,

'means and includes every corporation, company, association, joint-stock company or association, firm, partnership, or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter (*a*) may own, control, operate, or manage, within the State, directly or indirectly for public use, any plant, equipment, or property used or to be used for or in connection with the transportation of persons; * * * or that (*b*) may own or control any franchise, license, permit, or right to engage in any such business.' Appellees contend that the street railways in the city of Chicago are within the exception contained in the above statutory definition of a public utility, and are therefore not within the provisions of the Act, nor under the jurisdiction or control of the commission, because the city has secured a vested right for the purchase of these railways and a vested right to participate in the management and operation therefor. *In our opinion, the language of section 10 relied upon by the appellees can only be reasonably construed to mean that public utilities owned or operated by municipalities when the Act became effective should not be subject to the provisions of the Act, and that thereafter, as soon as a municipality should become the owner or take over the operation of a public utility, such public utility should thereby be withdrawn from the operation of the Act.*"

The Public Utilities Act, according to its title, is "An Act to provide for the regulation of public utilities."

Therefore it is proper to inquire what is a public utility within the contemplation of the Legislature. Did the Legis-

re intend that the Act should apply to municipal corpo-
ons? Will not a result be produced contrary to the in-
ion of the Legislature, if municipal corporations are
le subject to the Act?

The Legislature has itself expressly answered these ques-
s and has left nothing to inference. In the third para-
ph of section 10, the Legislature in terms, by the excep-
therein, excluded public utilities owned or operated by
nicipalities. Assuming for the argument that this was
discrimination which was unconstitutional, nevertheless
exception is clear evidence that the Legislature did not
template, as a result of any decision of this court, that
nicipal corporations and their plants should be included
hin the operation of the Act, any more than that farm-
would be included within the operation of the Anti-
st Act, although expressly excluded therefrom.

By paragraph 3 of section 10 a "public utility" is defined
"every corporation, company * * * that now or
eafter may own * * * any plant," etc.

What is a corporation or company within the meaning
the Act?

By paragraph 12 of section 10 the Legislature declares
t the term "company" does not include municipal corpo-
ions; and by paragraph 13 that the term "corporation"
s not include municipal corporations.

For convenience we here copy the paragraphs of section
above referred to, as follows:

> "The term 'public utility,' when used in this Act, means and includes every corporation, company, association, joint-stock company or association, firm, partnership, or individual, their lessees, trustees, or

receivers appointed by any court whatsoever (*except, however, such public utilities as are or may hereafter be owned or operated by any municipality*) that now or hereafter:

"(*a*) May own, control, operate, or manage, within the State, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this State; or for the production, storage, transmission, sale, delivery, or furnishing of heat, cold, light, power, electricity, or water; or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger; or that

"(*b*) May own or control any franchise, license, permit, or right to engage in any such business.

* * * * * * *

"The term 'company,' when used in this Act in connection with a public utility, includes any corporation, company, association, joint-stock company, or association, firm, partnership, or individual, their lessees, trustees, or receivers appointed by any court whatsoever, owning, holding, operating, controlling, or managing such a public utility, *but not municipal corporations.*

"The term 'corporation,' when used in this Act, includes any corporation, company, association, joint-stock company or association, *but not municipal corporations.*"

Taking all these paragraphs together, it clearly appears t the Legislature expressed its intention that—

> "The term 'public utility,' when used in this Act, means and includes every corporation (but not municipal corporations), company (but not municipal corporations) * * * (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter may own, control, operate or manage * * * any plant," etc.

Consequently, when the exception in paragraph 3 is read h paragraphs 12 and 13, it appears that the Legislature ended that "The term 'public utility,' when used in this t means and includes every *private* corporation * * * t now or hereafter may own, * * * control, oper- or manage * * * any plant," etc.

The court, in such case, might hold the statute unconsti- ional because municipal corporations were excluded; but rely the court would not be justified in reforming the Act as to include municipal corporations within its operation, ntrary to the intention of the Legislature. That "would ıse results not contemplated or desired by the Legislature." Speaking generally, the court may eliminate from a stat- unconstitutional provisions, and may narrow statutes by h elimination, but it cannot enlarge statutes by adding reto what the Legislature manifestly intended to exclude refrom.

In this case the Legislature eliminated municipal cor- rations from the Public Utilities Act. Plaintiff now asks e court to eliminate that elimination; and from that pro-

cess it results that municipal corporations would be included in the Act, notwithstanding the fact that the Legislature expressly enacted that they should be excluded therefrom. This, we respectfully submit, would be erroneous.

The principles above referred to were applied by the Supreme Court of Alabama to an analogous state of facts in the case of *Wilkinson vs. Stiles*, 76 So., 45, in which the court said, at page 46:

> "It is the general rule of statutory construction that if by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part (Lewis' Sutherland on Statutory Construction, § 306, and cases cited under notes 67 and 68). The foregoing section 306 was quoted from and approved in the case of *State ex rel. Collman vs. Pitts*, 160 Ala., 139; 49 South., 441, 686; 135 Am. St. Rep., 79. If a clause in a statute which violates the Constitution cannot be rejected without causing the Act to enact what the Legislature never intended, the whole statute must fall. *Spraigue vs. Thompson*, 118 U. S., 90; 6 Sup. Ct., 988, 30 L. Ed., 115; *Marsh vs. Hanly*, 111 Cal., 368; 43 Pac., 975; *Kelley vs. State*, 6 Ohio St., 269. Here we have a clause expressly excepting cities of a population of 35,000 or more, and to strike said clause and uphold the rest of the Act would extend the law to every city in the State, although the Legislature said that it should not do so. This is an entirely different question from the one considered in the case of *State vs. Davis*, 130 Ala., 148; 30 South., 344; 89 Am. St. Rep., 23, and kindred cases, as they

dealt with matter which was either not cognate to the title, or which involved two subjects, and where the Act was independent and complete, with the objectionable feature discarded, and the result of which holding tended to narrow the law rather than extend it as to territory or subject, so as to make it do something that the Legislature never intended, as would be the case in striking the exception or provision in question and upholding the remainder of the Act."

n the case of *State vs. Gantz,* 124 La., 535; 50 So., 524, statute required that all electrical work should be done der the supervision of a licensed master electrician, but mpted certain companies and municipal departments m the provisions of the Act. The court held that this vision constituted illegal discrimination, and that, in w of the fact that the exclusion of the exemption would der it impossible to enforce the legislative will, the whole was invalid. In conclusion the court said:

"The statute must be considered as a whole, and the intention as bearing on all its clauses. The character of the intention, its indivisible nature, affects the whole statute. It cannot be enforced. The statute, we infer, was adopted in accordance with a plan. According to it, there is exemption which is far-reaching."

VIII.

The plaintiff herein refers to the saving clause in sec- n 83 of the Public Utilities Act as authority for holding t the Act is valid and can be carried out after eliminating exception, and that it is therefore not necessary to de-

clare the whole Act invalid. This construction would no doubt be correct if applied to public utilities intended to be made subject to the Act, which would not change the purpose and scope of the Act. The saving clause cannot be properly used, however, to extend and enlarge the purpose and scope of the Act so as to include a whole class of public utilities not intended to be made subject to the Act, and also to repeal and nullify the provisions of another Act passed at the same session, contrary to the legislative intent, as disclosed by both Acts.

A somewhat similar question arose in the case of the *State vs. Bancroft*, 148 Wis., 124; 134 N. W., 330. In that case the court held that certain provisions of the Act were unconstitutional, and, notwithstanding the fact that the Act contained a saving clause providing that if any or all of such provisions should fail or be declared invalid, the court held that such provisions were merely declaratory of the rules of constitutional law, and, where it appears that the purpose of the Act cannot be carried out without such provisions, the whole Act is invalid. The language of the court on this point was as follows:

> "It is contended that the statute may be sustained in part, and the Legislature seems to have had some misgiving concerning the constitutionality of portions of the Act, because it is herein declared that pars. 1, 2, 3, 23, and 73 are to be considered separable or independent portions thereof, and that any one or all of said sections may fail or be declared invalid without affecting any other section or sections of the Act. Also that it was the further intention of the Legislature that, if any other separable or independent portion of the Act, not necessary for the

accomplishment of the main purpose sought to be accomplished, thereby fails, the remainder of said Act should not be affected by the failure of such separable or independent portion. This may be some indication of legislative intention; *but we regard it as merely declaratory of the rules heretofore laid down by this court on the same subject, and which are rules of constitutional law.*"

The saving clause applies only to any section, subdivision, sentence, or clause of the Public Utilities Act as applied to utilities subject to that Act. The language of that section can only be properly applied to the provisions of the Public Utilities Act which might be held invalid, without enlarging its scope or disturbing independent contemporaneous Acts of the Legislature. This Act was intended to provide for the regulation of private corporations, and the Legislature desired to avoid the escape of such private corporations from its provisions merely because some of them might be held unconstitutional. The Act was not intended to cover or relate in any way to municipally owned plants, and it could not be the intention of the Legislature to have the invalidity of any provision of the Act operate to extend the Act in such manner as to include such utilities and to repeal the regulatory provisions of the Municipal Ownership Act.

The Supreme Court of Illinois in the opinion herein refers to the passage of the Municipal Ownership Act and the Public Utilities Act at the same session of the Legislature, and reviews some the proceedings. Referring to the provision in section 10 of the Public Utilities Act excepting public

utilities owned or operated by a municipality, the court holds that there is no doubt that the Legislature intended that such public utilities should not be under the supervision of the Public Utilities Commission or subject to its authority.

It is clear that, if this exception is given effect as intended by the Legislature, the two Acts are consistent and harmonious with each other. If the exception is not given effect, the Acts are thereby made inconsistent, and the legislative intention is defeated.

The only way in which the exception in section 10 may be eliminated and the remainder of the Act may be held valid is to presume that the Legislature would not only have passed that Act without the exception, but would have intentionally repealed the regulatory provisions of the Municipal Ownership Act. In other words, the court must presume that the Legislature would have enacted into law provisions with respect to the regulation of public utilities which are directly contrary to those which it is admitted the Legislature intended should be the law.

The purpose and scope of these two Acts as framed by the Legislature and recognized by the court in this opinion is a matter of common knowledge. For several years there had been a growing demand for legislation providing for the municipal ownership, operation, and control of public utilities, on the one hand, and for the supervision and control of privately owned public utilities, on the other hand. This demand finally resulted in the passage by the Legislature of the two Acts in question, covering the entire field of public utilities. The Municipal Ownership Act gave to municipalities full and complete power for the ownership, operation, supervision, and control of public utilities by a

municipality, while the Public Utilities Act provided for the supervision, regulation, and control of privately owned public utilities by the Public Utilities Commission.

Notwithstanding the suggestion of the minority opinion of the Illinois Supreme Court as to repeal, it was well understood that the effective date of the Public Utilities Act was postponed six months only for the purpose of giving sufficient time to create the State Public Utilities Commission and make the necessary arrangements for complying with the provisions of the Act.

The inclusion of utilities owned and operated by municipalities under the Public Utilities Act and their exclusion from regulation and control by municipalities under the Municipal Ownership Act changes the scope and purpose of both Acts. When the plan and purpose of the Legislature as disclosed by these Acts is considered, it cannot be said that the Public Utilities Act would have been passed and approved if it had been understood that the Public Utilities Commission might assume control and supervision of all public utilities owned or operated by municipalities in this State, and that the regulation and control of such utilities would be taken from municipalities under the Municipal Ownership Act and other Acts applicable to any such utilities.

Consequently, if the exception in section 10 is invalid and cannot be given effect in accordance with the legislative intent as recognized by the court in this case and in the *O'Connell* case, then the whole Act must be held void, under the well-known rule that where a portion of an Act is void and the court cannot say that the Legislature would have passed

the Act with the void portion eliminated, then the entire Act is invalid. To the same effect, see also:

People vs. McBride, 234 Ill., 146, 148.
Cornell vs. People, 107 Ill., 372.
Heinz vs. People, 92 Ill., 406.
People vs. Cooper, 83 Ill., 585.

In conclusion the defendant respectfully submits to the court that the classification by the Illinois Legislature of municipal corporations and public utilities owned or operated by them, on the one hand, and private corporations and public utilities owned and operated by them, on the other hand, for the purpose of their regulation and supervision, is based upon substantial differences in the nature and character of their organization, management, and the purposes of their operation; that suitable and lawful regulation and supervision of such public utilities is provided for by the Municipal Ownership Act and Public Utilities Act respectively; but that if such classification is held to be unconstitutional, then the legislative intent cannot be effected and the entire Public Utilities Act is void.

Respectfully submitted,

ALBERT D. STEVENS AND
BAYARD LACEY CATRON,
Solicitors for Defendant in Error.

SPRINGFIELD GAS & ELECTRIC COMPANY *v.* CITY OF SPRINGFIELD.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 46. Argued October 19, 1921.—Decided November 7, 1921.

State legislation permitting a city owning an electric plant to sell electricity to private consumers and fix the rates by ordinance or resolution of the city council while subjecting a competing private corporation to regulation of its rates by a public commission, *held* not to deny the corporation the equal protection of the laws. Illinois Public Utilities Act, June 30, 1913, §§ 33, 34. P. 69.

292 Ill. 236, affirmed.

THE plaintiff in error brought this suit in a circuit court of Illinois to enjoin the City of Springfield from operating its plant for the production and sale of electricity to private consumers without having first filed rates, etc., as required by the Public Utilities Act of the State (Laws 1913, p. 459). A decree dismissing the bill was ultimately

affirmed by the state Supreme Court, whose decision is brought here by the present writ of error.

Mr. Philip Barton Warren and *Mr. Joseph S. Clark*, with whom *Mr. William L. Patton* was on the brief, for plaintiff in error.

A municipal corporation which supplies its inhabitants with electricity, gas or water, does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *Los Angeles* v. *Los Angeles Gas Corporation*, 251 U. S. 32; *Safety Wire Co.* v. *Baltimore*, 66 Fed. 140; *Walker* v. *Rock Island*, 146 Ill. 139; *Springfield* v. *Springfield Gas Co.*, 292 Ill. 236.

In exercising its private functions a municipality is, from every viewpoint and for every purpose, a private corporation.

The patron of a public utility service furnished by a municipality has the same rights to reasonableness of rates and equality of facilities as the patron of service furnished by any other private corporation.

A municipality furnishing public utility service owes the same duties and obligations to its patrons that any other private corporation does.

The attempted exemption of municipally operated commercial plants by § 10 of the Utilities Act is void, as being in violation of both the state and federal constitutional provisions against class legislation, because it is a special immunity granted the commercially operated municipal plant and relieves it from the same regulations imposed on the like plant of all other private corporations.

The regulation provided for in the Municipal Ownership Act is not of the same kind provided for in the Utilities Act.

The reason assigned by the Illinois court, as a substantial distinction, justifying the exemption of municipal

plants, viz, that because municipal records are open to inspection it is not necessary to require their utility rates to be published and approved by the State Commission, is untenable.

The other reason assigned, viz, that they may not profit to the same extent as plants operated by other private corporations, is also not tenable.

Under the Illinois court's interpretation of the act, that the city must fix rates sufficient to produce the revenue specified (§ 12), no higher, no lower, the city can not be required to fix reasonable rates.

Any legislative attempt to deny the city profits to the same extent as that granted other corporations in the operation of a utility, would be unconstitutional.

That one owner may not profit to the same extent as another does not constitute the kind of difference that justifies its exemption from regulation.

The elimination of the provisions exempting municipally owned utilities does not extend the scope of the Utilities Act beyond the intention of the legislature, as by § 83 it expressly manifested its intention to exempt municipalities only in the event it could do so without violating the Constitution.

Mr. Bayard Lacey Catron, with whom *Mr. Albert D. Stevens* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the plaintiff in error, a private gas and electric company, to restrain the defendant City from producing and selling electricity to private consumers without first filing schedules of rates and printing and posting the same as required by §§ 33, 34 of the Public Utilities Act of June 30, 1913. [Laws 1913, p. 459.] The bill was dismissed on demurrer by the Court of first instance. An appeal was taken to the

Supreme Court where the decree was affirmed on rehearing, after a previous decision the other way. The Public Utilities Act and the Municipal Ownership Act [Laws 1913, p. 455] were enacted by the State of Illinois within a few days of each other and, according to the Supreme Court of the State, as parts of a single plan. The former excepts municipal corporations from its requirements and the latter allows cities to go into this business among others and to fix the rates, which in the plaintiff's case are subject to the approval of the State Public Utilities Commission. The plaintiff contends that the exception of municipal corporations from the Public Utilities Act is void under the Fourteenth Amendment and that the act should be enforced as if the exception were not there.

It might perhaps be a sufficient answer to the plaintiff's case that the Supreme Court has intimated after careful consideration that the Utilities Act must stand or fall as a whole, so that if the plaintiff's attack upon the exception were sustained the whole statute would be inoperative and the only ground of the suit would fail. The plaintiff attempts to reargue the question, but upon this point the decision of the State Court would be final and would control. However, as the Supreme Court did not stop at that point, but, assuming that under the law of Illinois the plaintiff had a standing to demand the relief sought if its case was otherwise good, went on to decide the validity of the exception, we think it proper to follow the same course and to deal with the constitutional question raised.

The plaintiff's argument shortly stated is that in selling electricity the city stands like any other party engaged in a commercial enterprise and that to leave it free in the matter of charges while the plaintiff is subject to the Public Utilities Board is to deny to the plaintiff the equal protection of the laws. But we agree with the Supreme Court of the State that the difference between the two types of corporation warrants the different treatment that they have received.

The private corporation, whatever its public duties, is organized for private ends and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object it is a gain to a public body and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must. The Supreme Court seems to interpret the Municipal Ownership Act as limiting the charges allowed to what will be sufficient to meet outlays and expenses of every kind, thus emphasizing the purely public nature of the interests concerned and excluding the latitude for wrong that the plaintiff fears. The Court further says that the municipalities can exercise their power to make all needful rules and regulations only by ordinances and resolutions as in other public action. It calls attention to the fact that the accounts are regulated by law and open to the public eye, and that the consumers in this as in the other case may have a resort to the courts.

The plaintiff did not venture to contend that the submission of similar duties of different bodies to different tribunals was of itself unconstitutional, or that the fixing of rates might not be entrusted to city councils. But the fact that the municipality owned the plant for which its council fixed the rate was supposed to disqualify its officers, at least when other plants were submitted to the judgment of strangers. But a city council has no such interest in the city's electric plant as to make it incompetent to fix the rates. Whatever the value of the distinction between the private and public functions of the municipality, the duty of its governing board in this respect as we have said is public and narrowly fixed by the act. The conduct of which the plaintiff complains is not extortion but, on the contrary, charging rates that

draw the plaintiff's customers away. The standard for these rates, however, according to the Supreme Court, is fixed by the legislature. If the rates had been fixed by law at the present amounts it would be vain to deny their validity. The trouble with the plaintiff's argument is that it attempts to go behind the interpretation that the Supreme Court has given to the acts concerned and to overwork the delicate distinction between the private and public capacities of municipal corporations. It is unnecessary to refer to the numerous cases upon classification by state laws in order to show that the distinction in question here is very far from being so arbitrary that we can pronounce it bad.

Decree affirmed.